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CERTIFICATE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. ~~957~~ 166

STATE-PLANTERS BANK AND TRUST COMPANY, J. JORDAN LEAKE AND A. S. BUFORD, JUNIOR, PARTNERS TRADING UNDER THE FIRM NAME AND STYLE OF LEAKE AND BUFORD, AND THE FIRST NATIONAL COMPANY, APPELLANTS,

versus

T. NELSON PARKER, ELLSWORTH WILTSHIRE, AND M. POPE TAYLOR, TRUSTEES IN BANKRUPTCY OF THE ESTATE OF EDWARDS-SLAUGHTER CO., INC., BANKRUPT, APPELLEES.

ON APPEAL TO SUPERINTEND AND REVISE, IN MATTER OF LAW PROCEEDINGS OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND. IN BANKRUPTCY.

On a Certificate from the United States Circuit Court of Appeals for the Fourth Circuit.

Filed

May 29, 1930

United States Circuit Court of Appeals

Fourth Circuit.

No. 2826.

State-Planters Bank and Trust Company, J. Jordan Leake and A. S. Buford, Junior, partners trading under the firm name and style of Leake and Buford, and The First National Company, Appellants,

versus

T. Nelson Parker, Ellsworth Wiltshire, and M. Pope Taylor, Trustees in Bankruptcy of the Estate of Edwards-Slaughter Co., Inc., Bankrupt, Appellees.

On Appeal to Superintendent and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of Virginia, at Richmond.

Questions certified to the Supreme Court of the United States by the Circuit Court of Appeals of the Fourth Circuit on the case stated.

STATEMENT OF FACTS.

This is an appeal from orders entered in bankruptcy proceedings of the Edwards-Slaughter Company; and the principal question involved is the power of the District Court to enjoin proceedings in a state court instituted more than four months prior to bankruptcy to determine the rights of lien claimants in a fund now claimed by the trustees as representing the bankrupt. There is raised also the question of the power of the court in a

summary proceeding to order that the fund be paid over to the trustees when it appears that such fund is adversely held by a third person under a substantial and *bona fide* claim of right. From orders entered by the court below in favor of the trustees in bankruptcy, this appeal was taken by the State-Planters Bank and Trust Company, and its attorneys, who were enjoined from prosecuting the proceedings in the state court, and by the First National Company, one of the parties to those proceedings.

The facts out of which these jurisdictional questions arise are as follows: The bankrupt, on July 1, 1925, executed a deed of trust on certain property to the State-Planters Bank and Trust Company, hereinafter called the bank, to secure $60,000 in bonds, the payment of which was guaranteed by the First National Company. The bankrupt also executed and delivered to the bank its promissory note in the sum of $20,000, secured by a preferred maritime mortgage on the steamship M. M. Davis, to be held under the terms of the deed of trust as security for the bonds. It also delivered insurance policies upon the steamship in the amount of $60,000, payable to bankrupt and to the bank as trustee, in accordance with article ten of the deed of trust, which required that, so long as any of the bonds should be outstanding, bankrupt should carry fire and marine insurance on its steamers indorsed to the trustee. Later, when these policies were about to lapse for non-payment of premiums, the bank paid the premiums and renewed the policies with funds paid to it upon demand by the First National Company, the guarantor of the bonds secured.

The steamship was destroyed by fire on September 18, 1927, and there was collected on the policies insuring it the net sum of $58,256.67. A controversy arose as to whether the whole of this amount or only $20,000 thereof was applicable to the bonds secured by the deed of trust, the bank contending that it was entitled to apply the entire amount to this purpose, because of a provision of the deed of trust to the effect that all proceeds of insurance should be treated in the same manner as proceeds from a sale by foreclosure and should be applied in payment of bonds. For the purpose of determining this controversy, it instituted a suit in chancery, filing a bill of complaint in the Circuit Court for North-

umberland County, Virginia, against the bankrupt and others, in which it alleged that the holders of the bonds and interest coupons secured by the deed of trust were entitled to the entire proceeds of the insurance policies, but that, as certain claims had been asserted against these proceeds by others than the bond and coupon holders, it desired to have the guidance and protection of the court, and therefore requested it to supervise the distribution of the fund. The bankrupt and the guarantor filed answers to the bill, alleging that the entire proceeds of the insurance should be used in payment of the bonds and coupons and praying that same be so used.

This suit in the state court was instituted February 8, 1928. An order was entered on May 24, 1928, referring it to a master in chancery, and on September 29th following he filed his report therein. Prior to this, on August 8th, 1928, the Edwards-Slaughter Company had been adjudged a bankrupt, and when the master's report was filed on September 29th, a rule was issued by the Judge below against the bank and its attorneys to show cause why they should not be enjoined from further prosecuting the suit in the state court. This rule was made absolute on October 23, 1928, and on November 1st an order was entered directing the bank to pay into the bankruptcy court the fund in its hands. From these orders the bank and its attorneys appealed. Pursuant to the order the fund was paid over to the trustees, and is now in their hands.

The guarantor, not having been made a party to the rule, filed its petition setting forth the facts of the case, challenging the jurisdiction of the court to interfere with the proceedings in the state court, or by summary proceedings to require an adverse claimant of the fund in controversy to pay same into court, and praying that the injunction and order be set aside and the fund returned to the bank. The court, upon objection by the trustees in bankruptcy, declined to permit the guarantor to intervene or file its petition; and it, also, has appealed.

Being divided and in doubt, this Court respectfully certifies to the Supreme Court of the United States for its instruction and advice, the following questions of law, the determination of which is indispensable to a proper decision of the case:

QUESTIONS.

1. Where a trustee under a mortgage, having in its possession a fund which it claims to be subject to the mortgage, institutes a suit in a state court of chancery asking the court to declare the rights of the parties in the fund and supervise the distribution thereof, and makes parties thereto and obtains service upon all persons claiming an interest in the fund, who file answers praying action on the part of the court, does the state court acquire such jurisdiction of the *res* as gives it exclusive jurisdiction to determine the rights of the parties in the fund and order the distribution thereof?

2. Where a state court has acquired jurisdiction of the *res* in a suit instituted by a trustee to have the rights of claimants declared in a trust fund and to have such fund distributed under direction of the court, does the bankruptcy of one of the claimants of the fund occurring more than four months after the institution of the suit in the state court oust the state court of jurisdiction and vest exclusive jurisdiction in the bankruptcy court to determine the rights of the parties in the fund?

3. Where a fund claimed by a trustee in bankruptcy is held by a trustee under a mortgage executed by the bankrupt under a *bona fide* and substantial claim that it should be applied on bonds secured by the mortgage, has the court of bankruptcy the power to order its transfer to the trustee in bankruptcy in a summary proceeding?

Judge Waddill presided at the hearing of this case, but on account of illness has been unable to confer with regard to same or to join in this certification.

May 9, 1930.

JOHN J. PARKER,
U. S. Circuit Judge.

ELLIOTT NORTHCOTT,
U. S. Circuit Judge.

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA,
Fourth Circuit, ss:

I, CLAUDE M. DEAN, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the aforegoing is a true copy of the original certificate of the questions of law to the Supreme Court of the United States in the therein entitled cause filed and now remaining of record in the said United States Circuit Court of Appeals.

IN TESTIMONY WHEREOF, I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, at Richmond, Virginia, on this 13th day of May, A. D., 1930.

(Seal of Court)

CLAUDE M. DEAN, Clerk,
U. S. Circuit Court of Appeals,
Fourth Circuit.

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CLERK

BRIEF IN BEHALF OF STATE-PLANTERS BANK AND TRUST COMPANY

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 166.

STATE-PLANTERS BANK AND TRUST COMPANY, J. JORDAN LEAKE AND A. S. BUFORD, JR., PARTNERS TRADING UNDER THE FIRM NAME AND STYLE OF LEAKE AND BUFORD, AND THE FIRST NATIONAL COMPANY,

v.

T. NELSON PARKER, ELLSWORTH WILTSHIRE AND M. POPE TAYLOR, TRUSTEES IN BANKRUPTCY OF THE ESTATE OF EDWARDS-SLAUGHTER CO., INC., BANKRUPT.

ON APPEAL TO SUPERINTEND AND REVISE, IN MATTER OF LAW, PROCEEDINGS OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND, IN BANKRUPTCY.

ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

J. JORDAN LEAKE,
A. S. BUFORD, JR.,
PERCY S. STEPHENSON,
LITTLETON M. WICKHAM,
Counsel for State-Planters Bank and Trust Company.

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ON A CERTIFICATE FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF IN BEHALF OF STATE-PLANTERS BANK AND TRUST COMPANY.

The questions certified and the matters in respect of which they have been raised will most clearly and succinctly appear from the Statement of Facts and the Questions, which are set out in the Certificate of the Circuit Court of Appeals, and which, for convenience of reference, will be here copied *in extenso*, as follows:

I.

"STATEMENT OF FACTS.

"This is an appeal from orders entered in bankruptcy proceedings of the Edwards-Slaughter Company; and the principal question involved is the power of the District Court to enjoin proceedings in a state court instituted more than four months prior to bankruptcy to determine the rights of lien claimants in a fund now claimed by the trustees as representing the bankrupt. There is raised also the question of the power of the court in a summary proceeding to order that the fund be paid over to the trustees when it appears that such fund is adversely held by a third person under a substantial and *bona fide* claim of right. From orders entered by the court below in favor of the trustees in bankruptcy, this appeal was taken by the State-Planters Bank and Trust Company, and its attorneys, who were enjoined from prosecuting the proceedings in the state court, and by the First National Company, one of the parties to those proceedings.

"The facts out of which these jurisdictional questions arise are as follows: The bankrupt, on July 1, 1925, executed a deed of trust on certain property to the State-Planters Bank and Trust Company, hereinafter called the bank, to secure $60,000 in bonds, the payment of which was guaranteed by the First National Company. The bankrupt also executed and delivered to the bank its promissory note in the sum of $20,000, secured by a preferred maritime mortgage on the steamship M. M. Davis, to be held under the terms of the deed of trust as security for the bonds. It also delivered insurance policies upon the steamship in the amount of $60,000, payable to bankrupt and to the bank as trustee, in accordance with article ten of the deed of trust, which required that, so long as any of the bonds should be outstanding, bankrupt should carry

fire and marine insurance on its steamers indorsed to to the trustee. Later, when these policies were about to lapse for non-payment of premiums, the bank paid the premiums and renewed the policies with funds paid to it upon demand by the First National Company, the guarantor of the bonds secured.

"The steamship was destroyed by fire on September 18, 1927, and there was collected on the policies insuring it the net sum of $58,256.67. A controversy arose as to whether the whole of this amount or only $20,000 thereof was applicable to the bonds secured by the deed of trust, the bank contending that it was entitled to apply the entire amount to this purpose, because of a provision of the deed of trust to the effect that all proceeds of insurance should be treated in the same manner as proceeds from a sale by foreclosure and should be applied in payment of bonds. For the purpose of determining this controversy, it instituted a suit in chancery, filing a bill of complaint in the Circuit Court for Northumberland County, Virginia, against the bankrupt and others, in which it alleged that the holders of the bonds and interest coupons secured by the deed of trust were entitled to the entire proceeds of the insurance policies, but that, as certain claims had been asserted against these proceeds by others than the bond and coupon holders, it desired to have the guidance and protection of the court, and therefore requested it to supervise the distribution of the fund. The bankrupt and the guarantor filed answers to the bill, alleging that the entire proceeds of the insurance should be used in payment of the bonds and coupons and praying that same be so used.

"This suit in the state court was instituted February 8, 1928. An order was entered on May 24, 1928, referring it to a master in chancery, and on September 29th following he filed his report therein. Prior to this, on August 8, 1928, the Edwards-Slaughter Company had been adjudged a bankrupt, and when the master's

report was filed on September 29th, a rule was issued by the Judge below against the bank and its attorneys to show cause why they should not be enjoined from further prosecuting the suit in the state court. This rule was made absolute on October 23, 1928, and on November 1st an order was entered directing the bank to pay into the bankruptcy court the fund in its hands. From these orders the bank and its attorneys appealed. Pursuant to the order the fund was paid over to the trustees, and is now in their hands.

"The guarantor, not having been made a party to the rule, filed its petition setting forth the facts of the case, challenging the jurisdiction of the court to interfere with the proceedings in the state court, or by summary proceedings to require an adverse claimant of the fund in controversy to pay same into court, and praying that the injunction and order be set aside and the fund returned to the bank. The court, upon objection by the trustees in bankruptcy, declined to permit the guarantor to intervene or file its petition; and it, also, has appealed.

"Being divided and in doubt, this Court respectfully certifies to the Supreme Court of the United States for its instruction and advice, the following questions of law, the determination of which is indispensable to a proper decision of the case:

II.

"QUESTIONS.

"1. Where a trustee under a mortgage, having in its possession a fund which it claims to be subject to the mortgage, institutes a suit in a state court of chancery asking the court to declare the rights of the parties in the fund and supervise the distribution thereof, and makes parties thereto and obtains service upon all persons claiming an interest in the fund, who file answers praying action on the part of the court, does the state court acquire such jurisdiction of the *res* as gives it exclusive jurisdiction to determine the rights of the parties in the fund and order the distribution thereof?

"2. Where a state court has acquired jurisdiction of the *res* in a suit instituted by a trustee to have the rights of claimants declared in a trust fund and to have such fund distributed under direction of the court, does the bankruptcy of one of the claimants of the fund occurring more than four months after the institution of the suit in the state court oust the state court of jurisdiction and vest exclusive jurisdiction in the bankruptcy court to determine the rights of the parties in the fund?

"3. Where a fund claimed by a trustee in bankruptcy is held by a trustee under a mortgage executed by the bankrupt under a *bona fide* and substantial claim that it should be applied on bonds secured by the mortgage, has the court of bankruptcy the power to order its transfer to the trustee in bankruptcy in a summary proceeding?"

III.

POSITION OF BANK.

1. Question No. 1 should be answered, *Yes*.

2. Question No. 2 should be answered, *No*.

3. Question No. 3 should be answered, *No*.

IV.

ARGUMENT.

SUMMARY

A. THE FIRST QUESTION SHOULD BE ANSWERED IN THE AFFIRMATIVE:

1. The possession of the bank was in effect an actual possession on the part of the State Court:

(a) The bank was compellable, upon interlocutory application, to pay the fund into court.

(b) It could take no steps nor do any act with reference to its trust, until it had first obtained permission from the court.

(c) It could not dismiss the suit at pleasure but only in the discretion of the court.

but, even if this were not true,

2. The fund was in the constructive possession of the State Court, so that upon the filing of the bill, and without actual seizure by an officer of the court, it was exempt from interference by any other court of co-ordinate jurisdiction:

(a) The proceedings in the senior (or State) court were at least quasi in rem.

(b) The jurisdictions of the two courts were concurrent.

(c) *The nature of the bill was such as to give the senior (or State) court constructive possession.*

B. THE SECOND QUESTION SHOULD BE ANSWERED IN THE NEGATIVE:

1. The proceedings in the State Court were not such as to come within the provisions of §§ 3(a) (5) and 67(c), (e) and (f) of the Bankruptcy Act [U. S. C., tit. 11, §§ 21(a) (5), and 107(c), (e) and (f).]

2. There is nothing in the general powers of a Court of Bankruptcy [Bankruptcy Act, § 2 (7), (15); U. S. C., tit. 11, § 11 (7), (15)] to create for it an exclusive jurisdiction under the circumstances of the case at bar.

3. The cases asserting exclusive jurisdiction are not applicable to the case at bar.

C. THE THIRD QUESTION SHOULD BE ANSWERED IN THE NEGATIVE:

Where the trustee in bankruptcy is without possession (actual or constructive) either by seizure or surrender, or as successor in title to the bankrupt, a Court of Bankruptcy has no summary jurisdiction to take the property of a third party in possession representing claimants with a bona fide and substantial adverse claim (even though such third party does not claim a beneficial interest).

A.

QUESTION NUMBER ONE.

WHERE A TRUSTEE UNDER A MORTGAGE, HAVING IN ITS POSSESSION A FUND WHICH IT CLAIMS TO BE SUBJECT TO THE MORTGAGE, INSTITUTES A SUIT IN A STATE COURT OF CHANCERY ASKING THE COURT TO DECLARE THE RIGHTS OF THE PARTIES IN THE FUND AND SUPERVISE THE DISTRIBUTION THEREOF, AND MAKES PARTIES THERETO, AND OBTAINS SERVICE UPON ALL PERSONS CLAIMING AN INTEREST IN THE FUND, WHO FILE ANSWERS PRAYING ACTION ON THE PART OF THE COURT, DOES THE STATE COURT ACQUIRE SUCH JURISDICTION OF THE RES AS GIVES IT EXCLUSIVE JURISDICTION TO DETERMINE THE RIGHTS OF THE PARTIES IN THE FUND AND ORDER THE DISTRIBUTION THEREOF?

It is the position of the bank that this question should be answered in the affirmative.

Since the question is obviously intended to exclude the effect of bankruptcy on the conflict of jurisdiction between the State (or senior) Court and the Bankrupt (or junior) Court, the cases and authorities which we shall cite in this branch of our argument will in general be concerned only with courts of undoubtedly co-ordinate jurisdictions.

So much having been premised, we shall now try to show:

1. That the possession of the bank was in effect an actual possession on the part of the State Court and as such exempt from interference by any other court of co-ordinate jurisdiction;

and, even if this were not true—

2. That there was *constructive* possession on the part of the State Court, so that upon the filing of the bill, and without actual seizure by an officer of the Court, the fund was exempt from interference by any other court of co-ordinate jurisdiction.

We will take up these propositions in order.

1. The possession of the bank was in effect an actual possession on the part of the State Court and as such exempt from interference by any other court of co-ordinate jurisdiction.

The bill in the State Court in this case was in form an application by a trustee for guidance in the construction and administration of its trust (61)[1]. All persons interested were made parties (105) and appeared (106), and the matter was referred to a master in chancery, who made a report (71).

We respectfully submit that as a result of these proceedings the bank became, to the extent of the fund, a *quasi* receiver of the Court. This is so for the following reasons:

(a) The bank was always compellable, upon interlocutory application, to pay the fund into Court;

(b) The bank could take no steps, nor do any act, with reference to its trust, until it had first obtained permission from the Court;

(c) The bank could not dismiss the suit at pleasure, but, on the contrary, could do so only in the discretion of the Court.

These reasons will now be considered.

(a) *The Bank was always Compellable, upon Interlocutory Application, to Pay the Fund into Court.*

It is apparent from the Statement of Facts (56ff) that

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[1] Authority for statements of fact made in the course of this brief will be given by references to the Statement of Facts and the Questions, copied on page 2ff, *supra*, and will be indicated by appropriate line-numbers in bold-faced type inserted in parentheses.

the bank admitted in its bill that it held the fund subject to a trust in favor of the real owners, whoever they might be. This being true, any claimant, upon interlocutory application, could have required its payment into Court.

To such effect is a *dictum* in the case of *Blanton* v. *Heckscher*, 101 Va. 42, 44, (1902), where, although the party alleged to be a trustee *ex maleficio* denied liability as such and the rule was therefore held inapplicable, yet the court said (page 44):

> "The general rule of chancery practice, as to the payment of money into court, is that, where a fiduciary admits in his answer, or on his examination, or where it appears on a master's report unexcepted to that he has in hand money belonging to the trust estate, such money may be ordered to be paid into court upon interlocutory application."

The mere fact that in the case at bar the trustee bank was a party *plaintiff* and admitted in the bill its liability to the real owners cannot affect the application of this principle. The comment is equally appropriate to the following cases:

In *Davis* v. *Chapman*, 83 Va. 67, 74, (1887), the creditors of a decedent obtained a decree for money against the administrator and in favor of the general receiver of the court. There was no admission of liability, but, on appeal from the decree in favor of the receiver, it was *held* (page 74):

> "In a creditors' suit against a personal representative, the court *will always preserve the fund.*"[1]

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[1] In general, throughout this brief, italics are supplied by counsel unless otherwise indicated.

In *Farmer* v. *Yates*, 23 Grat. (64 Va.), 145, 150, (1873), the following holding was reached as the result of an elaborate examination of the English authorities (page 150):

> "The following appear to be the well settled doctrines of the law on this subject. I quote from 2 Lomax on Executors, 492 marg.; but I might quote to the same effect, and almost in the same words, from all the elementary works on the subject; for they all speak almost in the same language; and there appears to be no conflict among them. According to the present practice in England, the court will immediately, upon the coming in of the answer of an executor or administrator, *order so much as he admits to have in his hands, of the property* of the deceased, and after all deductions or claims against the estate, *to be paid into court;* though it was *formerly* thought necessary for the plaintiff to show that the executor or administrator had abused his trust, or that the fund was in danger from his insolvent circumstances."

(b) *The Bank could Take no Steps, nor do any Act, with Reference to its Trust, until it had first Obtained Permission from the Court.*

We respectfully contend that a trustee who has submitted his trust to the jurisdiction of the appropriate court cannot thereafter, no matter what may be the powers conferred on him by the instrument creating the trust, do any act with regard thereto except by the direction or with the ratification of the court.

A recent judgment of the Supreme Court of Appeals of

Virginia is in line with this doctrine. We refer to *Patterson* v. *Old Dominion Trust Co.*, 139 Va. 246, 257, (1924). The facts in this case will be set out hereinafter in some detail (*infra*, page 15); at present we need only quote the following from the opinion (page 257):

> "The trustee, however, in this case, not being willing to act on its own judgment, submits itself and the trust estate to the jurisdiction of a court of equity and seeks its aid, by impleading those who *may be beneficially* (*sic*) interested in the trust estate. By thus impleading the remaindermen, the trustee recognized their rights in the trust property and *made them the wards of a court of equity, whose peculiar duty it was to see that they were not arbitrarily dealt with by the trustee.*"

In this quotation the clauses italicized indicate at least a duty of very close supervision on the part of the court, a duty to which the principle stated in the first paragraph of this sub-head of the argument would seem to be necessarily correlative.

In any event the common-law doctrine is sufficiently shown by the following extracts from recognized English texts:

2 *Perry on Trusts*, (7th Ed.), § 474:

> "It must be observed, in the first instance, that whatever powers may be possessed by trustees, whether general or special, if the trust is before the court and a *decree* (*sic*) has been made, the powers of the trustees are thenceforth so far changed that they must have the sanction of the court for all their acts. *They cannot begin nor defend any suit without leave of the*

court; they cannot sell, nor make repairs, nor make investments, nor pay debts without consulting the court."

1 *Lewin on Trusts,* (1st Am. Ed.), *617:

"Where a suit has been instituted for the administration of the trust, *and a decree has been made, that (sic)* attracts the Court's jurisdiction, and the trustee cannot afterwards exercise the power without the concurrent sanction of the Court * * *."

These authorities find express support in the following decisions:

In *Baer* v. *Kahn,* 131 Md. 17, (1917), the beneficiary brought suit against her testamentary trustee in order to compel him to submit his trust to, and exercise it under, the jurisdiction of the appropriate court of chancery. The will had conferred large discretion in the management of investments, etc. The order by which the court assumed jurisdiction was reversed on the ground that should this be done the trustee could not exercise the discretion vested in him by the will because *once the court took jurisdiction the trustee must thereafter secure its consent or ratification for all his acts in the administration of the trust.* (Citing 2 *Perry on Trusts,* § 474, and *Lewin on Trusts* (11th Ed.), page 753).

Kramme v. *Mevshaw,* 147 Md. 535, 547, (1925), was a case in which the beneficiary under a testamentary trust filed a bill in equity against his trustee, praying that the court assume jurisdiction of the trust and enjoin a proposed private sale of the trust property. It was *held* that relief should be denied on the ground that the trustee was not under the jurisdiction of the court, the following reasons being given (page 547):

"The position of a conventional trustee over whose

trust the court has not assumed jurisdiction is that he is the special agent (trustee) of the creator of the trust, with power to exercise his own discretion according to the nature of the estate granted and within the scope of the power conferred, *while a trustee under a decree is an officer or arm of the court.* * * * if the court for any reason should assume jurisdiction of the trust, the situation of the conventional trustees 'is thereby so far changed that they must thereafter secure the sanction or ratification of the supervising court for the successive steps of their administration of the trust.'" Citing *Baer* v. *Kahn, supra.*

(c) *The Bank could not Dismiss the Suit at Pleasure, but, on the Contrary, could do so only in the Discretion of the Court.*

It is explicitly held in two recent cases in the Supreme Court of Appeals of Virginia that a fiduciary who has brought his trust into court is no longer *dominus litis* and may not dismiss at his pleasure if other rights have been manifested.

The most recent of these cases is *Patterson* v. *Old Dominion Trust Co.*, 139 Va. 246, 257, (1924), already referred to, in which a testamentary trustee had applied to the court of chancery for directions upon the questions whether or not it had, and, if having, should exercise, a power of sale of real estate. Process was served on all interested parties, but before answers could be filed, the bill was dismissed. This was held error, the court saying (page 257):

> "The trustee, however, in this case, not being willing to act on its own judgment, submits itself and the trust estate to the jurisdiction of a court of equity and seeks its aid, by impleading those who *may be beneficially* (*sic*) interested in the trust estate. By thus impleading the remandermen, the trustee recognized their rights in the trust property and made

them the wards of a court of equity, whose peculiar duty it was to see that they were not arbitrarily dealt with by the trustee.

* * * *

"The court having acquired jurisdiction of a trust estate, *we think the dismissal of the same rested in the sound discretion of the court and not upon the absolute right of the complainant.* Having been put upon notice that in the opinion of those who may be interested in the trust property, the same was about to be sacrificed, the court should, of its own motion, have held the matter in abeyance until satisfied of the reason for the dismissal of the suit; especially should this be true where infants' rights are involved, as they are in this cause."

The court then proceeded to refer to *Commonwealth* v. *Staunton Tel. Co.*, 134 Va. 291, 298, (1922), in which a public utility attempted to dismiss proceedings instituted by it before the State Corporation Commission. Holding that such matters were in the nature of chancery suits and that the relator was not entitled to a dismissal at his pleasure after other rights had been manifested, the court said with respect to the rule permitting a plaintiff to dismiss at will, (page 298):

"This rule is, however, subject to exception, as when a proceeding is instituted by a trustee, or involves the administration of a trust estate, which is peculiarly under the jurisdiction of courts of equity, or where in the progress of the case rights have been manifested which the defendant is entitled to claim. *Henderson* v. *Anderson*, 4 Munf. (18 Va.) 435; *Berry* v. *Second Bap. Church*, 37 Okl. 117, 130 Pac. 586; *Connor* v. *Drake*, 1 Ohio St. 170."

From the foregoing authorities we respectfully conclude that upon the filing of the bill on February 8, 1928, (68),

more than four months prior to the adjudication in bankruptcy on August 8, 1928, (72), the bank became an agent, or a *quasi* officer or receiver of the senior court, with the legal consequence that the fund was to all intents in the possession of that court. If such was the case, then, as needs no citation of authority to show, the fund became exempt from interference by any other court whatsoever of co-ordinate jurisdiction.

But even if this were not true, yet nevertheless—

2. There was constructive possession on the part of the State Court, so that upon the filing of the bill, and without actual seizure by an officer of the Court, the fund was exempt from interference by any other court of co-ordinate jurisdiction.

From the opinion in the recent case of *Harkin* v. *Brundage*, 276 U. S. 36, 43, (1928), we shall quote a passage establishing the conditions necessary before the mere filing of the bill in the senior court, without actual physical seizure by its officer, can create an absolute right in the court to non-interference on the part of all other co-ordinate tribunals. The passage spoken of occurs on page 43 and is as follows:

> "The principle which should govern in a conflict of jurisdiction like this has been a number of times stated by this court. As between two courts of concurrent and co-ordinate jurisdiction, the court which first obtains jurisdiction and constructive possession of property by filing the bill is entitled to retain it without interference and cannot be deprived of its right to do so, because it may not have obtained prior physical possession by its receiver of the property in dispute; but where the jurisdiction is not the same or concurrent, and the subject-matter in litigation in the one is not within the cognizance of the other, or there is no constructive possession of the property in dispute by the filing of a bill, it is the date of the

actual possession of the receiver that determines the priority of jurisdiction. *Moran* v. *Sturges*, 154 U. S. 256, 283, 284, 14 S. Ct. 1019, 38 L. Ed. 981; *Palmer* v. *Texas*, 212 U. S. 118, 29 S. Ct. 230, 53 L. Ed. 435; *Wabash Railroad* v. *Adelbert College*, 208 U. S. 38, 54, 28 S. Ct. 182, 52 L. Ed. 379; *Farmers' Loan & Trust Co.* v. *Lake Street Railroad Co.*, 177 U. S. 51, 61, 20 S. Ct. 564, 44 L. Ed. 667; and *Adams* v. *Mercantile Trust Co.* (C. C. A.) 66 F. 617. The difficulty in the application of the rule is in determining whether the conflicting jurisdictions are actually concurrent and the same. A doubtful question, too, is whether the bill is of such a character that its filing is the taking of constructive possession of the property."

In order, then, that the senior court may retain jurisdiction of the *res* as against actual seizure by an officer of the junior court, the following requisites must concur:

(a) The proceedings in the senior court must be at least *quasi in rem;*

(b) The jurisdiction of the two courts must be concurrent; and

(c) The nature of the bill must be such as to give the senior court constructive possession.

We shall take these up in order in the endeavor to show that all three conditions are satisfied by the case at bar.

(a) *The Proceedings in the Senior (or State) Court were at least Quasi in Rem.*

While the bill in the State Court was in form principally directed towards obtaining guidance and protection for the trustee bank (61), yet in essence it was a proceeding to establish title to the *res* (104) in the possession of the

bank (100). All persons claiming to be interested in the fund were made parties (105), and, like the complainant bank, asked for a determination of their rights in the property (107). It does not in any way appear from the Statement of Facts (and it would be doubtless absurd to suppose) that any of the parties in interest was seeking a *personal* judgment against any other. All rights assertible in the litigation were therefore wholly limited in their scope and effect by the fund in the possession of the bank.

Can there be any doubt that these proceedings, like any others to establish title to specific property, were at least *quasi in rem?*

This point is illustrated in *Pennoyer* v. *Neff*, 95 U. S. 714, 734, (1877), where it is said (page 734):

> "It is true that, in a strict sense, a proceeding *in rem* is one taken directly against property, and has for its object the disposition of the property, without reference to the titlt of individual claimants; *but, in a larger and more general sense, the terms are applied to actions between parties, where the direct object is to reach and dispose of property owned by them, or of some interest therein.* Such are cases commenced by attachment against the property of debtors, or instituted to partition real estate, foreclose a mortgage, or enforce a lien. So far as they affect property in the State, they are substantially proceedings *in rem* in the broader sense which we have mentioned."

Likewise in *Arndt* v. *Griggs*, 134 U. S. 316, (1890), it was held that an action to quiet title (very similar to the case at bar) was a proceeding sufficiently *in rem* to justify, under the due process clause of the Federal Constitution, a judgment against a non-resident on whom service had been had by publication only.

We may conclude that the proceedings in the senior court were at least *quasi in rem*.

(b) *The Conflicting Jurisdictions in the Present Case were Concurrent.*

The decision in *Harkin* v. *Brundage*,[1] *supra*, and the discussion, on pages 44 and 45 of the opinion, of the cases there referred to (this discussion is quoted in full on pages 64ff, *infra*), show conclusively that "concurrent" as applied to jurisdiction, means "having the same objects in the litigations involved." If we apply the test in the present case, there can be no doubt that the object of the proceedings in the State Court was identical with the ultimate object of the proceedings in the Bankruptcy Court. All interested persons were before the State Court for the determination of their rights in the fund (105) and must similarly have come before the Bankruptcy Court either in person or by representation. Both Courts in the end must necessarily have construed the deed of trust (61), and neither could finally have done more than distribute the particular property. In short, had both causes proceeded in due course, each would ultimately have resulted in competing decisions as to the title to the fund.

The jurisdictions were therefore concurrent.

In the majority of instances in which the filing of the bill without actual possession was held not to confer upon the senior court an absolute right to non-interference, it will be found that the element wanting was concurrence of jurisdiction. In order to illustrate the principles involved, one or two of these cases may be profitably examined.

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[1] 276 U. S. 36, 44, (1928).

Powers v. *Blue Grass, etc., Ass'n.*, 86 Fed. 705, (C. C. Ky., 1898) will be fully considered hereinafter (page 33, *infra*). For the present it is sufficient to say that at least one of the reasons why the junior court maintained its jurisdiction was that the proceedings before it were to test the validity of a general deed of assignment and were thus not concurrent with senior litigation, *inter partes*, to obtain judicial guidance for the assignee in the administration of his trust.

In *Empire Trust Co.* v. *Brooks*,[1] 232 Fed. 641, 649, (C. C. A. Tex., 1916), the court, at the close of what was said in *Harkin* v. *Brundage, supra*,[2] to be "a carefully reasoned opinion", thus applied its conclusions of law to the facts before it (page 649):

> "The suit in the district [state] court was instituted by a creditor and stockholder for the purpose of winding up the corporation and distributing its assets among its creditors as an insolvent corporation under the Texas statutes. No lien was sought to be enforced in it; the creditor, who was a bondholder, did not rely on his security, or seek to have enforced the lien of the mortgage. The trustee under the mortgage was not made a party to the proceeding in the state court. After the suit was brought, other holders of bonds and of stock intervened, as well as certain riparian claimants; but the nature and the purpose of the suit were in no wise changed. The foreclosure of the mortgage lien was never within the lis pendens of the state court suit. It was always and exclusively a liquidation proceeding by general creditors under the Texas statutes.

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[1] *Certiorari* denied, 245 U. S. 655.
[2] 276 U. S. 36, 44, (1928).

"The suit in the District Court of the United States for the Western District of Texas sought exclusively the foreclosure of a mortgage which was a first lien on the property of the corporation. The plaintiff was the trustee under the mortgage, the defendants were the mortgagor and certain subsidiary corporations. The record show quite conclusively that there was no probable equity over and above the mortgage indebtedness, and that the bondholders were primarily, if not exclusively, interested in the administration of the property. They had a prior claim over the unsecured creditors represented in the state insolvency proceedings, a claim which was not within the issues or subject-matter of that proceeding. Though some of the creditors in the state suit happened to be bondholders, they were not there insisting on their security or seeking to enforce it, and so were in the attitude of unsecured creditors.

"Under the circumstances, we conclude that the issues, the subject-matter, and the relief prayed for in the two suits are so different that it cannot be said there is a conflict of jurisdiction between them. *If both suits had sought the winding up of the corporation because of its insolvency, or both had sought to enforce a mortgage lien on the property of the corporation, such a conflict of jurisdiction would have existed, and possession would have been rightly surrendered to the court in which the first suit was instituted.*

"Neither the rule that, in case of conflict of jurisdiction, possession should be surrendered to the court first acquiring jurisdiction of the controversy, where it is or may be required for the purposes of the litigation during its progress, nor the rule against the disturbance of the court's possession has, therefore, any application in this case."

It is to be noted that this case recognizes the doctrine

of constructive possession where the jurisdictions are actually concurrent.

In *Harkin* v. *Brundage*,[1] *supra*, it was held (apart from the effect of a fraud on the senior court) that a creditors' bill in the junior court was sufficiently different from a stockholders' bill (in the senior court) to make the rule of non-interference inapplicable.

The foregoing discussion, it is respectfully submitted, sufficiently shows that in the present case the two jurisdictions were concurrent, or competitive. But since, as we are *assuming* in this part of our argument, physical seizure of the *res* was never made by the senior court or its officers, it will now be necessary to show that, nevertheless, it had constructive possession from the moment the bill was filed.

(c) *The Nature of the Bill was such as to give the Senior (or State) Court Constructive Possession.*

Where the proceedings are *in rem* or *quasi in rem*, and the conflicting jurisdictions, having been invoked for the same purposes, are concurrent, what conditions give the senior court such constructive possession of the *res* that, in the absence of physical seizure, it may maintain its jurisdiction against all attacks?

The question is answered in the case of *Farmers, etc., Co.* v. *Lake, etc., R. Co.*, 177 U. S. 51, 61, (1900), in which the senior proceedings were instituted in a Federal Court for foreclosure and the appointment of a receiver. Before the receiver was appointed, but after the commencement of the senior proceedings, a bill was filed in a State

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[1] 276 U. S. 36, 44, (1928).

Court to enjoin the foreclosure and remove the trustee under the mortgage. Holding that these matters were necessarily involved in the senior litigation (the jurisdictions were thus *concurrent*) and that the mere filing of the bill in the senior court vested it with exclusive jurisdiction, this Court said (page 61):

> "The possession of the *res* vests the court which has first acquired jurisdiction with the power to hear and determine all controversies relating thereto, and for the time being disables other courts of co-ordinate jurisdiction from exercising a like power. This rule is essential to the orderly administration of justice, and to prevent unseemly conflicts between courts whose jurisdiction embraces the same subjects and persons.
>
> *"Nor is this rule restricted in its application to cases where property has been actually seized under judicial process before a second suit is instituted in another court, but it often applies as well where suits are brought to enforce liens against specific property, to marshal assets, administer trusts or liquidate insolvent estates, and in suits of a similar nature where, in the progress of the litigation, the court may be compelled to assume the possession and control of the property to be affected. The rule has been declared to be of especial importance in its application to Federal and state courts. Peck* v. *Jenness*, 7 How. 612; *Freeman* v. *Howe*, 24 How. 450; *Moran* v. *Sturges*, 154 U. S. 256; *Central Bank* v. *Stevens*, 169 U. S. 432; *Harkrader* v. *Wadley*, 172 U. S. 148."

Therefore, the test is:

> "In the progress of the litigation" will the court "be compelled to assume the possession and control of the property to be affected"?

and it is met when

> "*suits* are brought to *enforce liens against specific property*, to marshal assets, *administer trusts* or liquidate insolvent estates, and in *suits* of a similar nature * * *."

The above requirements are obviously satisfied by the senior proceeding in the instant case. It was a *suit, inter partes* (**105**); it had, as a basic object, the *enforcement of the bondholders' lien against the specific res* (**56**); and, in form, it was for the *administration of a trust* (**62**).

Moreover, if the bank as trustee had threatened to remove the fund from its jurisdiction, the Court in order to protect its litigants would have been compelled to assume actual possession and control, under penalty of seeing its decrees become mere *brutum fulmen*. Suppose, indeed, that the bank, becoming dissatisfied with its chances of success before the State Court, decided to construe the mortgage for itself and turn the money over to the bondholders, what protection would the other parties to the suit have had, unless the Court could instantly require the surrender of the property? A suit to try title, if the court cannot act upon the *res* itself, is a proceeding as vain and empty as a receivership when the property has been seized by another court.

We submit, therefore, that, unless the quotation from the case last cited is to be treated as pure *dictum*, or unless it has been since overruled (and we cannot discover that it has), then it furnishes a decisive answer to the First Question and the jurisdiction of the senior court must be held exclusive.

In *Palmer* v. *Texas*, 212 U. S. 118, (1909), the rule of constructive possession found reaffirmation. In this case proceedings were instituted in a state court to forfeit the franchise of a corporation, and thereafter a receivership was asked for and allowed. An appeal and supersedeas were taken from the order of allowance, and on the same

day, by a consent decree, a *Federal* receiver was appointed *and put in possession of the property.* The State Court was then asked to order the Federal receiver to surrender the property, but, instead of doing so, it directed its own receiver to appeal from the order of the Federal Court.

This Court held that the property must be returned to the State receiver, and after quoting from *Farmers' etc. Co.* v. *Lake, etc., R. Co.*[1], *supra*, the passage given above, continued as follows (page 129):

> "If this rule is not applied, a court of competent jurisdiction, which by the law of its own procedure has acquired jurisdiction of property, may find itself, as in this case, after final judgment maintaining its right over the property, at the conclusion of the litigation deprived of the subject-matter of the suit. Indeed, this case would be an apt illustration of that situation. The courts of Texas have sustained the right to the receivership, and have held it was only suspended pending the appeal, but when it comes to enforcing the right to administer the property, if the Federal receivership is maintained the court of original jurisdiction finds itself stripped of the property and the same being administered in another court, which acquired its dominion over the property after it had become subject to the state jurisdiction."

In *Kline* v. *Burke Constr. Co.*, 260 U. S. 226, 231, (1922), in a quotation from *Baltimore & Ohio R. Co.* v. *Wabash R. Co.*, 119 Fed. 678, 680, the rule of constructive possession, pronounced and applied in the two preceding cases, was repeated *verbatim.* Moreover, this Court on page 229 of the opinion (in the *Kline* case) also said:

> "Where the action is in *rem* the effect is to draw to the federal court the possession *or control*, actual *or*

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[1] 177 U. S. 51, 61, (1900).

potential, of the res, and the exercise by the state court of jurisdiction over the same res necessarily impairs, and may defeat, the jurisdiction of the federal court already attached. The converse of the rule is equally true, that where the jurisdiction of the state court has first attached, the federal court is precluded from exercising its jurisdiction over the same res to defeat or impair the state court's jurisdiction."

We would respectfully invite the Court's attention to the italicized phrases in the above quotation. They indicate clearly that "control", such as we have shown in the preceding portion of this brief to have been the undoubted prerogative and duty of the State Court under the law of Virginia, is a conception, in the rules of non-interference, interchangeable with that of actual "possession." We would also call attention to that part of the opinion in this case which commences on page 235, where the same ideas are again expressed and emphasized.

The foregoing decisions of this Court would seem to be decisive of this branch of our argument. At the risk, however, of perhaps unnecessarily prolonging our brief we shall proceed to refer to a few additional cases that illustrate and enforce the principles under consideration.

In *Sharp* v. *Bonham*,[1] 213 Fed. 660, (D. C. Tenn., 1913), the decision of the junior court was pleaded as *res adjudicata*, and denied, under the following circumstances: Members of the A Congregation filed their bill in the Federal Court against the trustees and members of the B Congregation, their object being to obtain a decree that the defendant trustees held certain property in trust for the complainants. No receivership was prayed for either by the bill or afterwards. A plea to the jurisdiction was sustained and the complainants appealed to this Court. Meanwhile the defendants (excluding the trustees) brought

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[1]See also *Louisville Trust Co.* v. *Knott*, 130 Fed. 820, 824, (C. C. A. Ky., 1904).

a suit in the State Court against the complainants involving precisely the same question as did the senior cause and finally obtained a decision in their favor and against the complainants in the senior court. Thereafter the senior court's action in sustaining the plea to the jurisdiction was reversed by this Court and the cause remanded, whereupon the defendants set up the decision in the State Court in their favor as *res adjudicata*.

Held, decree for complainants.

The judge, who was the late Mr. Justice Sanford, rendered an elaborate opinion, the purport of which will be made clear by the following extracts (page 665):

> "Under these circumstances the controlling question presented is whether or not the proceedings in this court prior to the institution of the suit in the Chancery Court were such as to vest in this court exclusive jurisdiction of the subject matter of the litigation so as to deprive the State courts of any jurisdiction in regard thereto, pending the final termination of the suit in this court.
>
> "It is clear, on the one hand, as a rule of substantive law, applicable as between the Federal and State courts, that the court which first acquires jurisdiction over property in controversy or the res which constitutes the subject matter of the suit, is entitled to retain that jurisdiction to the end of the litigation without interference from any other court whatever. 3 Street, Fed. Eq. Pract. Sec. 2529, p. 1466, and cases cited in note 41. And this is more than a mere rule of comity as between the State and Federal courts; it is a 'principle of right and law' which so operates that when one court takes a specific thing into its jurisdiction that res is as much withdrawn from the judicial power of any other court as if it had been carried physically into a different territorial sovereignty. *Covell* v. *Heyman*, 111 U. S. 176, 182, 4 Sup. Ct. 355, 28 L. Ed. 390."

Then the rule in cases of suits *in personam* is stated and the court continues (page 666):

"The precise question for determination in the present case then is whether this suit, which was brought to declare and enforce a trust upon which the church property was held, and in which the trustees holding title to the property were made party defendants and brought before the court, is to be deemed as falling within the rule applicable to suits where the res is in the actual possession of the court, on the one side, in which case its jurisdiction remained exclusive until the determination of the litigation, or whether, on the other hand, it is to be deemed analogous to a mere suit in personam, in which this court had not exclusive jurisdiction and in which the prior judgment in the State courts should be held conclusive as to the rights of the present litigants through their proper class representation in the other suit.

"After careful consideration of the authorities I am of opinion that the nature of this suit is such that this court must be held to have had *exclusive jurisdiction of the subject matter of the controversy even although the property involved had not been taken into its actual custody.*"

Amongst other authorities, the following are cited (page 667):

"In *Illinois Steel Co.* v. *Putnam* (5th Cir.) 68 Fed. 515, 517, 15 C. C. A. 556, 558, the court said in language which is cited with approval in 3 Street, Fed. Eq. Pract. Sec. 2534, p. 1470:

'Where a bill in equity brings under the direct control of the court all the property and estate of the defendants, or of certain named defendants, or

certain designated property of all or of either of the defendants, to be administered for the benefit of all entitled to share in the fruits of the litigation, and the possession and control of the property are necessary to the exercise of the jurisdiction of the court, the filing of the bill and service of process is an equitable levy on the property, and pending the proceedings such property may properly be held to be in gremio legis. The actual seizure of the property is not necessary to produce this effect, where the possession of the property is necessary to the granting of the relief sought. In such cases the commencement of the suit is sufficient to give the court whose jurisdiction is invoked the exclusive right to control the property. *Adams* v. *Trust Co.*, 66 Fed. 617 (15 C. C. A. 1).'"

Finally the court, after quoting the familiar rule of constructive possession announced in *Farmers, etc., Co.* v. *Lake, etc. R. Co.*,[1] *supra*, concludes as follows (page 668):

"Applying the rule laid down in the foregoing authorities, I am of opinion that this suit, *being brought to declare and enforce a trust in real property and being one in which the trustees holding title to the property were brought before the court by service of process, and in which in the progress of the litigation the court might be compelled to assume possession and control of the property to be affected*, must be deemed a suit in the nature of a suit in rem in such sense that upon the filing of the bill and the issuance and service of the process the exclusive jurisdiction of this court attached, * * *."

In re Hoey, 292 Fed. 269, 270, (D. C. N. Y., 1922), was a motion in Bankruptcy to enjoin a suit which, about three

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[1] 177 U. S. 51, 61, (1900).

weeks before the petition was filed, had been brought to establish a constructive trust in certain specific property, viz., a seat in a Coffee Exchange. The injunction was denied, the court saying on page 270:

> "There is, however, no case that I can find which holds that after a suit *in rem* has been started in a state court, bankruptcy proceedings are in a different position from any other judicial proceedings; or that the earlier court must yield because the later court is one of bankruptcy. *Furthermore, it is not in this class of cases necessary that that the earlier court should have actually assumed custody of the res before the second suit is commenced. It is enough that the first should be one in which custody could be assumed at any time after bill filed.*"

In *Boston, etc., Corp.* v. *Salina, etc., Co.*, 3 F. (2d) 729, 733, (C. C. A. Utah, 1925), the object of the senior litigation in the State Court was to quiet title to specific property, and, for the purposes of the case, was held to be in every material way identical with the junior Federal cause.

Held, the Federal suit must be stayed.

The court said in part (page 733):

> "The appellants claim that there was no conflict of jurisdiction between the cases in the state and federal court, because the suit in the state court was not an action in rem, and that court had not taken possession of the property involved. The suit in the state court alleged the ownership and possession in the Salina Company of coal, mineral, and timber in and upon 2,410.35 acres of land in Utah, asserted that the defendant Klemm claimed, without right, some interest therein, and prayed a decree barring him from asserting any further claim. This was a suit to quiet the plaintiffs' title, permitted in this form by section 7247 of the Compiled Laws of Utah 1917. *Parley's Park*

Silver Mining Co. v. *Kerr*, 130 U. S. 256, 261, 9 S. Ct. 511, 32 L. Ed. 906; *Glasmann* v. *O'Donnell*, 6 Utah, 446, 450, 24 P. 537. It was not an ordinary action in personam, but was in the nature of a suit in rem, and sought a decree declaring the title to the property. The rule governing as to suits of this nature was stated by this court in *Zimmerman* v. *So Relle*, 80 F. 417, 420, 25 C. C. A. 518, 521 as follows:

> 'But when, as in the case at bar, two suits in chancery are pending between the same parties, the one in a state and the other in a federal court, the object of both suits being to quiet the title to the same tract of land, that court which first acquires jurisdiction by the issue and service of process must be allowed to proceed with the hearing and determination of the case; and, so long as the first suit remains pending and undetermined, the action of the court in which it is pending should not be embarrassed by proceedings taken or orders made in the case which was last brought.'

"And substantially the same rule was announced in *Dennision Brick & Tile Co.* v. *Chicago Trust Co.* (C. C. A.) 286 F. 818, 820. See, also, 6 Pom. Eq. Jur. sec. 743."

We may add that an identical conclusion was reached in the early case of *Orton* v. *Smith*, 18 How. 263, which was decided by this Court in 1855 and in which junior proceedings to quiet title in the Federal Court conflicted with an action of ejectment in the State Court.

Only two decisions have been found in any way opposed to the foregoing authorities, and are easily distin-

guishable. The earlier of them is *Powers* v. *Blue Grass, etc., Ass'n*[1], 86 Fed. 705, (C. C. Ky., 1898), in which the assignee under a deed of general assignment had brought suit in a State Court for the construction of his trust. In order that the rights of the various classes of claimants in the fund might be determined, representatives of each were made defendants. It likewise appeared that though the assignee applied for permission to pay the fund into court *he was not permitted to do so.* Thereafter a suit was instituted in the Federal Court attacking the validity of the deed of assignment, and praying for a receivership, which was allowed over the contention that the senior court had jurisdiction of the *res.*

The ruling was based on two distinct grounds:

(1) The jurisdictions were not concurrent. (We have already discussed this point on page 21, *supra.*)

(2) The assignee held under his deed and not as an officer of the State Court, which did not have constructive possession. (To this we may reply, first, that the court had declined to take actual possession, and, if this is not a sufficient answer, secondly, that the rule in the case of *Farmers, etc., Co.* v. *Lake, etc., R. Co.*[2], *supra,* controls).

For the reasons given we respectfully submit that the case is not authority against us.

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[1] *Supra,* page 21.

[2] 177 U. S. 51, 61, (1900).

The other decision referred to as apparently hostile is the recent one of *Hinkley* v. *Art Students' League*[1], 37 F. (2d) 225, (C. C. A. Md., 1930), in which the Federal Court took jurisdiction to construe a will, although the testamentary trustees had applied many years before in *ex parte* proceedings to the Circuit Court of Baltimore for advice and directions. The following quotation from the opinion will plainly show how different this case was from that at bar (page 226):

> "In Farmers' Loan, etc., Co. v. Lake St. El. Rd. Co., supra, 177 U. S. 51, 61, 20 S. Ct. 564, 658, 44 L. Ed. 667, in referring to the noninterference rule, it was said: '* * * But it often applies * * * where, in the progress of the litigation, the (senior) court may be compelled to assume the possession and control of the property to be affected.'
>
> "We believe that the rule referred to cannot apply in the case here. The senior jurisdiction of the circuit court of Baltimore city is only such jurisdiction as may be exercised in an ex parte proceeding instituted by trustees. This is confined to advising and directing the trustees. In the exercise of such jurisdiction we can conceive of no situation in which the court could possibly be compelled to assume possession and control of any of the property of the trust estate. Possession by the court's sheriff or receiver can never be necessary in merely advising and directing trustees. Disputes as to ownership of the property could not be settled in an ex parte proceeding. Proceedings against the trustees based on charges of dereliction of duty would have to be presented in a proceeding inter partes. It seems to be clear that the non-interference principle is based on a possible future need for possession of specific property by the court which has

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[1] Affirming 31 F. (2d) 469. *Certiorari* denied, 281 U. S. 733.

> first undertaken a jurisdiction of such nature that in the course of the proceedings possession by the court (by its officer) may become necessary. Obviously, where the prior jurisdiction is of such nature that possession of property by the court can never be necessary, the rule must be inapplicable."

In the case at bar, however, the senior litigation *was* a proceeding *inter partes* (**105**) and the powers of the Court might have been invoked against the bank by any defendant, *e. g.*, the Guarantor (**25, 63**). An active jurisdiction, such as this, was surely entitled to respect, even though counsel for the Trustees in Bankruptcy assert that jurisdiction *ex parte* could have been ignored.

Reverting to *Hinkley* v. *Art Students' League*, *supra*, we may also point out that as shown by the following quotation from page 227 of the opinion the State and Federal jurisdictions were not concurrent—an additional distinction from the case at bar:

> "A further result of the ex parte character of the proceeding in the state court is that that court has not undertaken, and could not (in an ex parte proceeding) undertake, jurisdiction to adjudicate attacks on the title of the trustee. As such questions could be validly settled only in a proceeding inter partes, there is no validity in the contention of priority of jurisdiction on the part of the state court. The first and only court that has ever had jurisdiction of the subject-matter, of the cause and of the necessary parties, in other words the first and only court that has ever had the power to hear and decide the title to the property in dispute is the trial court."

From the foregoing authorities we respectfully conclude that the Circuit Court for Northumberland County, Vir-

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[1]37 F. (2d) 225, (C. C. A. Md., 1930).

ginia, had at least a constructive possession of the *res*, that its jurisdiction was consequently exclusive of that of all co-ordinate courts, and that the First Question should be answered in the *affirmative*.

B.

QUESTION NUMBER TWO.

WHERE A STATE COURT HAS ACQUIRED JURISDICTION OF THE RES IN A SUIT INSTITUTED BY A TRUSTEE TO HAVE THE RIGHTS OF CLAIMANTS DECLARED IN A TRUST FUND AND TO HAVE SUCH FUND DISTRIBUTED UNDER DIRECTION OF THE COURT, DOES THE BANKRUPTCY OF ONE OF THE CLAIMANTS OF THE FUND OCCURRING MORE THAN FOUR MONTHS AFTER THE INSTITUTION OF THE SUIT IN THE STATE COURT OUST THE STATE COURT OF JURISDICTION AND VEST EXCLUSIVE JURISDICTION IN THE BANKRUPTCY COURT TO DETERMINE THE RIGHTS OF THE PARTIES IN THE FUND?

It is the position of the bank that this question should be answered in the negative.

We shall assume in this branch of our argument that the First Question is properly answerable in the affirmative for the reasons already given, viz.: (a) the jurisdictions involved were each *in rem*, (b) they were concurrent and (c) the senior bill was such as to create at least a constructive possession on the part of the State Court. The Second Question, then, presents this problem: Were the State Court and the Bankruptcy Court co-ordinate tribunals?

It is respectfully submitted that under the circumstances of the case at bar the Circuit Court for Northumberland County was in every respect co-ordinate with the Bankruptcy Court. This is true for the following reasons:

1. The proceedings in the State Court were not such as to come within the provisions of §§ 3(a) (5) and 67(c), (e) and (f) of the Bankruptcy Act [U. S. C., *tit.* 11, §§ 21(a) (5) and 107(c), (e) and (f)].

2. There is nothing in the general powers of a Court of Bankruptcy [Bankruptcy Act, § 2 (7), (15); U. S. C., *tit.* 11, § 11 (7), (15)] to create for it an exclusive jurisdiction under the circumstances of the case at bar.

3. The cases asserting exclusive jurisdiction in the Bankruptcy Court are not applicable to the case at bar.

These points will be treated in order.

1. The proceedings in the State Court were not such as to come within the provisions of §§ 3(a) (5) and 67(c), (e) and (f) of the Bankruptcy Act [U. S. C., tit. 11, §§ 21(a) (5) and 107(c), (e) and (f)].

It may be freely conceded, that if the senior proceedings had themselves constituted or resulted in an act of bankruptcy, or if the rights involved were such as are invalidated by bankruptcy, then they would have been superseded when the petition was filed. To this extent the two jurisdictions are not co-ordinate. The concession, however, does not affect this case, since a mere inspection of § 3(a) (5), and of the applicable parts of § 67 will indicate that they are wholly irrelevant to the present inquiry.

The former section, 3(a) (5), declares in effect that, where a person makes a general assignment for the benefit of his creditors, or, being insolvent, applies for a receiver or trustee, or, because he is insolvent, a receiver or trustee is put in charge of his property, any of these things shall constitute an act of bankruptcy.

Now it is apparent from the Statement of Facts, pages

2ff, *supra*, that none of these events occurred. Although it is our contention that the bank, upon the institution of the suit, did in fact become a *quasi* receiver of the State Court, yet its receivership was only *quoad* the specific property involved, and it did not arise out of insolvency proceedings.

It is equally apparent that §§ 67 (c), (e) and (f) are without bearing. Every lien, conveyance, encumbrance, and the like, invalidated by these sections must have been created within the four months next before the filing of the petition. In the present case, however, as we have often pointed out, no lien was created within that period. The deed of trust, for the construction of which the suit was brought, had been executed in 1925 (21) and the suit itself was commenced precisely six months before bankruptcy occurred (69, 72). Such being the facts, we fail to see how the relative powers of the two courts can be affected by any part of § 67, any more than by § 3(a) (5).

But is there anything in the general powers of the Bankruptcy Court that under the present circumstances would confer upon it a jurisdiction superior to that of the State Court? We respectfully submit that there is not; that, on the contrary, indeed—

2. There is nothing in the general powers of a Court of Bankruptcy conferred by § 2 (7), (15) of the Act [U. S. C., tit. 11, § 11 (7), (15)] to create for it an exclusive jurisdiction in the case at bar.

It may be well first to set out the applicable provisions of § 2, with the final saving clause. These are as follows:

> "The courts of bankruptcy * * * are hereby invested * * * with such jurisdiction * * * as will enable them * * * to * * * (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as

herein otherwise provided; * * * (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the enforcement of the provisions of this title; * * *.

"Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

As there is certainly nothing in the preceding quotation expressly applicable to the case at bar, we must look to the adjudicated cases for assistance. One of the earliest of these arose under the Bankruptcy Act of 1867, (14 Stat. 517, Rev. Stat. Title LXI, §§ 4972-5132, with amendments of 1874, 18 Stat. 178), which appears to have conferred upon the District Courts substantially the same general powers as does the Act of 1898 (U. S. C., *tit.* 11). Yet in *Eyster* v. *Gaff*, 91 U. S. 521, 1875), the holding in effect was that State Courts are in general co-ordinate with the Courts of Bankruptcy. What happened was that, pending certain foreclosure proceedings in a State Court, the mortgagor was declared a bankrupt. The State Court subsequently entered the decree of sale and foreclosure through which the plaintiffs in the case traced title in ejectment, the defendant asserting that, as all proceedings in the State Court after adjudication in bankruptcy were void, his title, derived from the bankrupt, was good against the purchasers under the decree of sale.

Held, plaintiffs entitled to recover.

This Court said in part (page 524):

"It is a mistake to suppose that the Bankrupt Law avoids of its own force all judicial proceedings in the State or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act

which sanctions such a proposition.

"The court in the case before us had acquired jurisdiction of the parties and of the subject-matter of the suit. It was competent to administer full justice, and was proceeding, according to the law which governed such a suit, to do so. It could not take judicial notice of the proceedings in bankruptcy in another court, however seriously they might have affected the rights of parties to the suit already pending.

"It was the *duty* of that court to proceed to a decree as between the parties before it, until by some proper pleadings in the case it was informed of the changed relations of any of those parties to the subject-matter of the suit. Having such jurisdiction, and performing its duty as the case stood in that court, we are at a loss to see how its decree can be treated as void. * * * In the absence of any appearance by the assignee, the validity of the decree can only be impeached on the principle that the adjudication of bankruptcy divested the other court of all jurisdiction whatever in the foreclosure suit. The opinion seems to have been quite prevalent in many quarters at one time, that, the moment a man is declared bankrupt, the District Court which has so adjudged draws to itself by that act not only all control of the bankrupt's property and credits, but that no one can litigate with the assignee contested rights in any other court, except in so far as the circuit courts have concurrent jurisdiction, and that other courts can proceed no further in suits of which they had at that time full cognizance; and it was a prevalent practice to bring any person, who contested with the assignee any matter growing out of disputed rights of property or of contracts, into the bankrupt court by the service of a rule to show cause, and to dispose of their rights in a summary way. This court has steadily set its face against this view."

A later case, arising under the Act of 1898, and on the

same subject, in which the property in dispute was actually in the hands of a receiver appointed by the State Court, was *Metcalf* v. *Barker*, 187 U. S. 165, (1902), where the material facts were as follows: In 1896 Metcalf Brothers commenced a judgment creditors' action in the State Court against Lesser Brothers with the object of avoiding certain prior receivership proceedings as fraudulent. By a final decision of the highest court of the State, rendered in February, 1900, the receivership was upheld except as to the Metcalfs, to whom the receivers were directed to pay the amount of their claim. In the meantime, however—that is, early in 1899—Lesser Brothers had become involuntary bankrupts, and in March, 1900, their trustee procured from the court of bankruptcy an order enjoining Metcalf Brothers from receiving the fruits of the decision of the State Court.

Among the questions certified to this Court the following only were answered, the first in the negative, the second in the affirmative:

> "1. Had the District Court of the United States for the Southern District of New York jurisdiction to make the injunction order in question?"
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> * * * * *
>
> "3. Did Metcalf Brothers & Co. by the commencement of their creditors' action acquire a lien on the property of the bankrupts superior to the title of the trustee thereto?"

This Court, speaking through Mr. Chief Justice Fuller, said in part (page 175):

> "This creditors' action was commenced December 17, 1896, more than eighteen months before the passage of the bankruptcy act, and was prosecuted with exemplary diligence to final and complete suc-

cess in the judgment of the Court of Appeals. At this point the bankruptcy court intervened and on summary proceedings enjoined Metcalf Brothers & Company from receiving the fruits of their victory. The state courts had jurisdiction over the parties and the subject matter, and possession of the property. And it is well settled that where property is in the actual possession of the court, this draws to it the right to decide upon conflicting claims to its ultimate possession and control."

After other authorities had been cited, principally *Peck* v. *Jenness*, 7 How. 612, (1849), and *White* v. *Schloerb*, 178 U. S. 542, (1900), the conclusion was reached that the District Court was without jurisdiction to issue the injunction complained of.

Although the foregoing is very close to the case at bar, it might perhaps be distinguished on the ground that in the instant case the property was in the hands, not of an actual receiver, but rather, as has been shown, of a *quasi* receiver—one whose receivership was a supervening modification of its original possession. In view of the authorities already quoted in sub-head A of our argument the distinction does not strike us as impressive; but the case now to be mentioned should remove all doubts on the subject.

This was *Pickens* v. *Roy*, 187 U. S. 177, (1902), decided the same day as *Metcalf* v. *Barker*[1], *supra*. Here the facts were that in 1889 one Dent (afterwards Roy) filed a bill in the State Court against Pickens seeking to avoid for fraud a deed made by him to certain trustees. The bill was subsequently amended to show that the complainant had recovered a judgment against Pickens and to pray

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[1] 187 U. S. 165, (1902).

that the land conveyed by him be subjected thereto. In 1899, the bill being yet undisposed of, Pickens was adjudicated bankrupt. He then prayed a stay in the State Court, but his trustee, appointed later, asked that court to proceed and it thereupon entered a decree setting aside the deed and ordering the land to be rented out by one of its commissioners until a certain day and then sold. When the commissioner was about to sell Pickens obtained a temporary injunction, which was later dissolved by the District Court.

Held, no error.

This Court, after reciting the foregoing facts, said on page 180:

> "Such being the state of facts, the Circuit Court of Appeals held that the District Court had no jurisdiction of the suit, even if it had been brought in the name of the trustee, who could not have sued defendants below in that court in respect of the bankrupt's property, unless by consent, while the bankrupt himself had no standing in that court after adjudication, *Bardes* v. *Hawarden Bank*, 178 U. S. 524; and further, that *as the Circuit Court of Barbour County had at the time of the adjudication, and had had for years, complete jurisdiction and control over the bankrupt and his property, that jurisdiction was not divested by the proceedings in bankruptcy, and it was the right and duty of that court to proceed to final decree notwithstanding adjudication, the rule being applicable that the court which first obtains rightful jurisdiction over the subject-matter should not be interfered with. Frazier* v. *Southern Loan and Trust Company*, 99 Fed. Rep. 707. And Goff, J., speaking for the court, said: 'The bankrupt act of 1898 does not in the least modify this rule, but with unusual carefulness guards it in all of its detail, provided the

suit pending in the state court was instituted more than four months before the District Court of the United States had adjudicated the bankruptcy of the party entitled to or interested in the subject-matter of such controversy.' * * * We are of opinion that the Circuit Court of Appeals was right in its rulings."

It will be observed that the case just cited is in all respects analogous to that at bar; in fact, the former hardly seems to demand an upholding of the State Court's jurisdiction so much as the latter. In neither of the two cases was the *res* at the commencement of bankruptcy in the actual possession of an officer appointed by the Court. Moreover, in the case at bar, as we have shown, the bank is an arm or agent of the senior court, or a *quasi* receiver, while in *Pickens v. Roy* no sort of receivership antedating bankruptcy is indicated. Both cases, also, are *in rem*, deal with the enforcement of asserted liens, and in both the liens were created before the four months period. Furthermore, we have been unable to find any intervening statutory modifications to lead to different conclusions in the case at bar, the Amendment of 1903 to § 3(a), substantially the same as the present sub-section (5), and dealt with in *In re Watts & Sachs* (discussed *infra*, page 50) being irrelevant.

An examination of the large number of cases on the subject in the lower Federal Courts will show that the general principle we are contending for has been universally recognized, and that such apparent exceptions as there are occur under the impact of §§ 3(a) (5) and the applicable parts of § 67 of the Act. Thus, for example, the State suit will be superseded where it is to enforce a lien invalidated by the Act. Similarly, State *insolvency* proceedings give way, and, when the appointment of a receiver amounts to an act of bankruptcy, he will be required to surrender the property in his possession to the trustee. But we have not found a single instance where a suit *in rem*, not coming

within the purview of § 3(a) (5) or § 67, has been superseded.

On the contrary in *In re Hoey*, *supra*, the holding was precisely in accordance with the position of the bank in the case at bar. Here, as we have stated, less than three weeks before the petition in bankruptcy was filed a suit was instituted in a State Court to establish a constructive trust in a seat in an Exchange, of which the State Court, of course, never acquired physical possession. The Court of Bankruptcy declined to stay the senior proceeding, saying (page 270):

> "There is, however, no case that I can find which holds that after a suit *in rem* has been started in a state court, bankruptcy proceedings are in a different position from any other judicial proceedings; or that the earlier court must yield because the later court is one of bankruptcy. *Furthermore, it is not in this class of cases necessary that the earlier court should have actually assumed custody of the res before the second suit is commenced. It is enough that the first should be one in which custody could be assumed at any time after bill filed.* * * * *Orinoco Iron Co.* v. *Metzel* (C. C. A. 6th), 230 Fed. 40, 144 C. C. A. 338, was a case where the suit *in rem* had been commenced after petition filed and the decision turned on that fact. Therefore, I can see no reason for staying the suit to reclaim the Coffee Exchange seat."

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[1] 292 Fed. 269, (D. C. N. Y., 1922).

In *Pollack* v. *Meyer*, 233 Fed. 861, (C. C. A. Mo., 1916), where the bankrupt owned a remainder interest in a trust estate, which had been under administration in a State Court and had terminated by the death of the life-tenant, it was conceded that the Bankruptcy Court would not have interfered with the State Court's possession until it had disposed of the trust.

In *In re Farrell*, 201 Fed. 338, (C. C. A. Ohio, 1912), the bankrupt contracted with the respondent for the construction of a schoolhouse, but defaulted, whereupon the respondent completed the work, but a large sum, to which it did not assert ownership, remained in its hands out of the contract price. Since a still greater amount was owed to materialmen and other lienors, a suit was instituted in the State Court to subject the fund to the liens. Eighteen months later the contractor was adjudicated a bankrupt. The petitioner as trustee in bankruptcy thereupon asked the court appointing him for a stay of the State proceedings. This was denied, the court saying, on page 340:

> "The regularity of the proceedings to foreclose the liens is not questioned, *nor can it be denied that the state court acquired complete jurisdiction and control over all the parties and property long prior to the commencement of the bankruptcy proceedings against Heintz.*"

This case is in point. Like that at bar it was for the purpose of enforcing a lien on specific property, and the property was held by one not the regularly appointed receiver of the senior court.

In re Rohrer, 177 Fed. 381, (C. C. A. Ohio, 1910), was a

case precisely like *Pickens* v. *Roy*, *supra*, in that it was there attempted to enjoin a sale under a decree of foreclosure obtained *less than a month* before adjudication, though the lien itself was then more than a year old. The injunction was denied, the court saying (page 383) that the lien neither of the mortgage nor of the foreclosure was denounced by any provision of the Bankruptcy Act and further:

> "The state court acquired complete jurisdiction and control over the defendants and the property prior to the commencement of the bankruptcy proceeding * * * and that jurisdiction was not divested by anything done in that proceeding; 'the rule being applicable that the court which first obtains jurisdiction over the subject matter should not be interfered with.'" Citing *Pickens* v. *Roy*, 187 U. S. 177, (1902), *supra*, and *Farmers', etc., Co.* v. *Lake, etc., R. Co.*, 177 U. S. 51, (1900), *supra*.

Thus the rule of the *Farmers' Loan & Trust Co.* case was deliberately applied in favor of a State Court in conflict with a Court of Bankruptcy.

In *In re English*, 127 Fed. 940, (C. C. A. N. Y., 1904), the court, on page 943, thus stated the question at issue and its decision thereon:

> "The situation, as we view it is this: Two parties claimed certain personal property as tenants in common and sought the aid of the state court to determine their rights, and to distribute the property or its proceeds. The state court, by its receiver, took possession of the corpus of the property, and converted it into money which the receiver held to be distributed between the respective claimants when their rights should

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[1] 187 U. S. 165, (1902).

be determined. All this took place more than a year before petition in bankruptcy was filed. Indisputably, the state court had full jurisdiction of the parties, of the controversy, of the subject-matter, and had reduced the property to its possession. We know of no provision of the bankruptcy act, and our attention is called to no authority, *which will sustain the proposition that, when a year afterwards one of the parties to the action is adjudicated a bankrupt, the state court is shorn of its jurisdiction to determine the controversy, and must turn over the property to the bankruptcy court.*"

It is true that in the preceding case, as in *Metcalf* v. *Barker*,[1] the property was in the hands of a receiver appointed by the senior court; but, as we have shown, it would be difficult to distinguish the possession of the bank in the case at bar from a technical receivership.

It will be observed that all the preceding cases, except the first two from this Court, were decided after the Amendment of 1903, on which the series of decisions now to be considered are based.

3. The cases asserting exclusive jurisdiction are not applicable to the case at bar.

In these cases the broad statement is sometimes made that the jurisdiction of a Court of Bankruptcy in the administration of the affairs of insolvents "is exclusive of all other courts". As we have said, our researches have not disclosed any instance in which a prior suit *in rem* not falling within the range of application of §§ 3(a) (5) and 67 (c), (e) and (f), of the Act has been superseded by bankruptcy; but since counsel for the Trustees will probably assert that the jurisdiction of the United States Dis-

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[1] 187 U. S. 165, (1902).

trict Court in the case at bar was "exclusive" in the broadest sense, it would be well to examine the decision they are likely to rely on most strongly.

This is the case of *In re Watts & Sachs*, 190 U. S. 1, (1903), decided immediately after the Amendment of 1903 went into effect. It grew out of proceedings for contempt against attorneys alleged to have induced the State Court (where receivership proceedings were pending) to seize forcibly property of the insolvent in the hands of a receiver in bankruptcy appointed less than two months after the institution of the State suit. This Court held that the attorneys were not guilty of contempt, because they were entitled to their *bona fide* opinion as to the relative powers and duties of the two courts, and because, in any event, the action of the State Court was *ex proprio motu*. Thus the Court ruled that there was anyhow insufficient evidence to support a conviction, but in the course of the opinion took occasion to say (page 27):

> "And the operation of the bankruptcy laws of the United States cannot be defeated by *insolvent commercial corporations applying to be wound up under state statutes.* [This is not what happened in the case at bar.] The bankruptcy law is paramount, and the jurisdiction of the Federal Courts in bankruptcy, *when properly invoked*, [We submit that this qualification should not be disregarded.] in the administration of the affairs of insolvent persons and corporations, is essentially exclusive. Necessarily when like proceedings in the state courts are determined by the commencement of proceedings in bankruptcy, care has to be taken to avoid collision in respect of property in possession of the state courts. Such cases are not cases of adverse possession, or of possession in enforcement of pre-existing liens, [such as existed in the case at bar], or in aid of the bankruptcy proceedings. The general rule as between courts of concurrent jurisdic-

tion is that property already in possession of the receiver of one court cannot rightfully be taken from him without the court's consent, by the receiver of another court appointed in a subsequent suit, but that rule can have only a qualified application where *winding up proceedings* [The senior suit was not for winding up.] are superseded by those in bankruptcy as to which the jurisdiction is not concurrent."

And, further, speaking of the State Court and the attorneys (page 27):

"Their view was that the jurisdiction of the state court having attached, that court was, in all circumstances, entitled to exercise it until voluntarily surrendered. But if the state court had taken into consideration that Zier & Company had committed acts of bankruptcy in the matter of preferential transfers; that the amendatory bankruptcy act of February 5, 1903, provided that acts of bankruptcy would exist if a person 'being insolvent, applied for a receiver or trustee for his property or because of insolvency a receiver or trustee has been put in charge of his property under the laws of a State, of a Territory, or of the United States;' and that the intent of the bankruptcy law is to place the administration of affairs of insolvents exclusively under the jurisdiction of the bankruptcy courts,' it appears to us that instead of continuing the application of the Federal receiver for three weeks, the court should have directed the surrender of the property to him at once, or at least

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'We respectfully submit that if this statement is given a *universal* application it is doubly *obiter*, yet counsel for the Trustees in bankruptcy must make it the foundation of their entire case.

after the report of its own receiver on returning from Indianapolis."

The foregoing case is believed to be the origin of the idea that bankruptcy jurisdiction is *universally* exclusive; but it has no bearing on the case at bar. In proof of this we would respectfully observe:

1. That the petition in bankruptcy in *In re Watts & Sachs* was filed less than four months after the appointment of the state receiver.

2. That the Amendment of 1903 spoken of in the opinion, page 51, *supra*, and substantially the same as § 3(a)(5) of the present Act necessarily conferred exclusive jurisdiction under the circumstances covered by that Amendment.

3. That since *In re Watts & Sachs* did in fact present one of the cases dealt with by the Amendment, it would be going beyond the decision to say that it also controls cases not dealt with by the amendment.

4. That, as was pointed out by Mr. Justice Harlan in his concurring opinion (page 36) in *In re Watts & Sachs*, the ruling on the bankruptcy question was not necessary to the decision.

5. That, even if the Amendment be taken into consideration, it would be strange if *In re Watts & Sachs* was intended to overrule *Metcalf* v. *Barker*[1] and *Pickens* v. *Roy*,[2] *supra*, without in any way alluding to them, when those cases were decided six months before and in opinions delivered by the same justice.

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[1]187 U. S. 165, (1902).
[2]187 U. S. 177, (1902).

6. That *In re Watts & Sachs* is not in point with *Metcalf* v. *Barker*, where there was a state receivership created long before bankruptcy, nor with *Pickens* v. *Roy*, in which the State suit was concerned with only a portion of the bankrupt's property, nor, indeed, with the case at bar *in which the State Court assumed jurisdiction and control more than four months before the petition was filed* (68, 72) *and in which the record utterly fails to show that the property in controversy was the whole of the bankrupt's estate.*

7. In none of the decisions of this Court in which *In re Watts & Sachs* has been cited, viz.: *Globe Bank* v. *Martin*, 236 U. S. 288, (1915); *Stellwagen* v. *Clum*, 245 U. S. 605, (1918); *Lion, etc., Co.* v. *Karatz*, 262 U. S. 640, (1923); *Taubel-Scott-Kitzmiller* v. *Fox*, 264 U. S. 426, (1924), has it been applied to supersede state proceedings *in rem* commenced more than four months before bankruptcy.

For the foregoing reasons we think it may be concluded that the case of *In re Watts & Sachs* is not of controlling effect upon the case at bar.

In *U. S. Fidelity Co.* v. *Bray*, 225 U. S. 205, (1912), it was said (page 217):

> "* * * the jurisdiction of bankruptcy Courts in all 'proceedings in bankruptcy' is intended to be exclusive of all other courts, and that such proceedings include, among others, all matters of administration, such as the allowance, rejection and reconsideration of claims, the reduction of the estates to money and its distribution, the determination of the preferences and priorities to be accorded to claims presented for allowance and payment in regular course, and the supervision and control of the trustees and others who are employed to assist them."

But it will be observed that this case does no more than

hold that the Bankruptcy Court had exclusive jurisdiction of questions arising before it, and of the disposition of funds in its hands and that it had no power to do what it attempted to do in this case, namely, direct the determination of such matters in a separate suit. We respectfully submit, furthermore, that to call the senior proceedings in the case at bar "proceedings in bankruptcy" would be to beg the very question here in issue.

An illuminating opinion on the general question was rendered by Circuit Judge Woods in the case of *Griffin* v. *Lenhart*, 266 Fed. 671, (C. C. A. W. Va., 1920), in which it was sought to take from the State Court control of land on which attachment liens had been acquired by proceedings in that court more than four months before the petition was filed. The Circuit Court of Appeals refused to permit this, and after a discussion of *In re Watts & Sachs*,[1] and *Metcalf* v. *Barker*[2] *and Pickens* v. *Roy*[3], *supra*, attempted a distinction between the various classes of cases as follows (page 674):

> "Where a state court has obtained complete jurisdiction *by hostile proceedings, which creditors have instituted for the enforcement of their demands*, and in which creditors have acquired liens on property more than four months before the filing of the petition in bankruptcy, the disposition of the property for payment of the liens should be left to the state court, without interference from the court of bankruptcy. In such case the trustee in bankruptcy is interested only in the surplus proceeds of sale, and in having the suit in the state court pressed with due diligence.
>
> "But this rule does not apply to protective proceed-

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[1] 190 U. S. 1, (1903).
[2] 187 U. S. 165, (1902).
[3] 187 U. S. 177, (1902).

> ings instituted in a state court. The principle of the bankruptcy statute paramount to all others is that all creditors shall have the right to a speedy winding up of the bankrupt business and distribution of the assets. No creditors can be deprived of this right by a proceeding instituted at any time in a state court by an insolvent or any of his creditors, for the purpose of continuing his business or protecting the assets against creditors, or in any way delaying creditors. This is none the less true, although one of the objects of the creditors' proceedings in the state court be to acquire a lien, and the actual result be the creation of a lien more than four months before the filing of the petition in bankruptcy."

In the case at bar it is perfectly obvious that the senior proceedings were not protective in the sense of the foregoing quotation, but that on the contrary they were hostile, consisting as they did, of a suit by the bank to claim the entire fund in possession for the benefit of its bondholders, not for the other claimants (**56 ff**).

The following quotations from recognized texts will further reinforce our position:

1 *Loveland on Bankruptcy*, (4th Ed.), p. 140:

> "Where the possession of the state court has the effect of defeating the operation of the bankruptcy law, the courts of bankruptcy may take property from the custody of the state court for the purpose of administering it in accordance with that law. This occurs where property is in the possession of a receiver of a state court, the appointment of which receiver constituted an act of bankruptcy upon which the adjudication is made, or where the judgment appointing a receiver within four months of bankruptcy creates an equitable judicial lien void under Section 67f, or where property is in the possession of a sheriff or other

officer of a state court by virtue of an execution on a judgment or an attachment void under Section 67f of the act, or where the state court has taken possession of specific property for the purpose of enforcing a mortgage or other lien on it, where the lien is invalidated by the bankruptcy act."

2 *Remington on Bankruptcy*, (2nd Ed.), § 1599:

"To the rule that the state court will retain jurisdiction if it is the first to obtain custody of the property, there are three exceptions: First, where the possession of the State Court has itself created a lien by legal proceedings within four months of the bankruptcy, whilst the debtor was insolvent; second, where a receiver, assignee or trustee appointed by the State Court within four months of the bankruptcy, is in possession; third, where the possession is under state insolvency proceedings that are superseded by the Bankrupt Act."

None of the exceptions mentioned can have any application to the case at bar.

We respectfully conclude that the Circuit Court for Northumberland County, Virginia, was under the circumstances of this case, in every respect co-ordinate with the Bankruptcy Court and that the Second Question should be answered in the *negative*.

C.

QUESTION NUMBER THREE.

WHERE A FUND CLAIMED BY A TRUSTEE IN BANKRUPTCY IS HELD BY A TRUSTEE UNDER A MORTGAGE EXECUTED BY THE BANKRUPT UNDER A BONA FIDE AND SUBSTANTIAL CLAIM THAT IT SHOULD BE APPLIED ON BONDS SECURED BY THE MORTGAGE, HAS THE COURT OF BANKRUPTCY THE POWER TO ORDER ITS TRANSFER TO THE TRUSTEE IN BANKRUPTCY IN A SUMMARY PROCEEDING?

It is the position of the bank that this question should be answered in the negative.

It will be observed that the point involved in the Third Question is a narrow one. It presupposes (a) that the property is not in the physical possession of the bankrupt or of an officer of the Bankruptcy Court and (b) that the claim under which it is held is *bona fide* and substantial. Since, however, as a reference to *Harrison* v. *Chamberlin*, 271 U. S. 191, 195, (1926), will show, possession by a third party under a *bona fide* and substantial claim cannot in general be interfered with in summary proceedings, the question resolves itself into this: Whether the trustee under a mortgage, in possession but not claiming the property for itself, will be permitted to invoke the rule of adverse claimancy—the claim being concededly *bona fide* and substantial—in behalf of its *cestuis que trustent*?

There is a lack of authority upon this point, but we believe that the cases now to be referred to demonstrate:

Where a trustee in bankruptcy is without possession (actual or constructive) either by seizure or surrender, or as successor in title to the bankrupt, a Court of Bankruptcy has no summary jurisdiction to take the property from a third party in possession representing claimants with a bona fide and substantial adverse claim (even though such third party does not claim a beneficial interest).

In the first place, we invite the Court's attention to the following facts:

Article ten of the deed of trust required fire insurance payable to the bank **(33)**.

The policies delivered with the deed were endorsed to the bankrupt and to the trustee **(32)**; but

The bankrupt in its answer filed in the State Court waived all claim to the proceeds of insurance **(63 ff)**.

It nowhere appears that the Trustees in bankruptcy are asserting any claim under §§ 67(c), (e) and (f), or 70(e) of the Act [U. S. C., *tit.* 11, §§ 107(c), (e), (f), 110 (e)] by which the original transfer of the fund to the bank **(43, 100)** might be invalidated.

The conclusion necessarily follows that the Bankruptcy Court cannot take jurisdiction by virtue of any "constructive" ownership of the fund on the part of the bankrupt.

The following cases dispose of the necessity of a beneficial interest on the part of the party in possession.

In *In re Baudouine*, 101 Fed. 574, 578, (C. C. A. N. Y., 1900), testamentary trustees, summarily proceeded against by their *cestui's* trustee in bankruptcy to subject the trust estate for the benefit of the creditors, appeared specially to object to the jurisdiction, and to insist upon their right to be sued in a plenary action. This was sustained. The

court pointed out that under the law of New York the whole estate in a trust of the kind was vested in the trustees and that no person beneficially interested could in any way dispose of his interest or alienate or anticipate the income and then the Court continued as follows (page 578):

> "Such being the nature of the trust, it is obviously the right and duty of a trustee to protect the income for the use and enjoyment of the beneficiary * * *. He is entitled to insist that he shall not be prevented from paying it to the beneficiary and compelled to pay it to another. If the fund can be reached by the trustee in bankruptcy after it has come into the hands of the bankrupt, the testamentary trustees are not necessary parties to an action. But if it is sought to be reached before they have discharged their fiduciary and statutory obligation towards the beneficiary, *they are in duty bound to resist. In defending their trust duties they are hostile to the trustee in bankruptcy*, and if they are entitled to be heard at all, they are entitled to contest his title as fully as though they were the equitable owners of the fund."

In re Farrell, 201 Fed. 338, 240, (C. C. A. Ohio, 1912), has already been discussed above, page 47, in connection with the rules of constructive possession; but it is also in point here. In that case, it will be recalled, the bankrupt defaulted on a building contract, and the owner completed the work. There was then left in its hands out of the contract price a sum of money, but less than was owed to various lienors, who commenced a suit in the State Court to subject the fund. More than a year later, the contractor having become bankrupt, his trustee asked for a stay of the senior proceedings. This was denied, the court saying (page 240):

> "It is equally true that the controversy between these parties is of such character that it can be determined only by a plenary suit in a court of competent

jurisdiction. While the respondent [the owner in possession of the fund] *does not claim to be the owner of the money in question, yet it holds the fund as the legal custodian for lien claimants* who are asserting rights in and to it adverse to those of the trustee in bankruptcy, and who, in accordance with the law, invoked the aid of the proper state court to enforce their liens more than eighteen months prior to the filing of the petition in bankruptcy."

First National Bank v. *Chicago Title & Tr. Co.*, 198 U. S. 280, (1905), is very close on the general question. About eight months before he was adjudicated bankrupt, one Rodgers deposited certain seed with a warehouse company in return for which he was given receipts acknowledging delivery and undertaking to surrender the property to his order upon payment of charges and presentment of the receipts. Immediately thereafter he endorsed and hypothecated these instruments to certain creditors. After the adjudication in bankruptcy, the receiver reported that it had taken possession of the seed and asked the court's direction as to its disposition, whereupon the pledgees of the receipt, along with the warehouse company, appeared specially, and objected to the jurisdiction of the Bankruptcy Court on the ground that the property was in the possession of the warehouse company when the petition was filed. It does not appear, however, from the report of the case either in this Court or in the court below (*Re Rodgers*, 125 Fed. 169) that the company made any claim for storage charges, or that any rights based on such a claim were asserted; certainly none are referred to in either opinion. This Court held that the District Court was without jurisdiction, and it was said (page 291):

"The District Court adjudged that the receiver had not at the time of filing its petition the right of possession, and that the National Storage Company, at that date, and also at the time of the filing of the petition in bankruptcy, was entitled to possession and

had possession. Nevertheless it retained jurisdiction and decreed payment to petitioners out of the proceeds of the sale."

The Court, after discussing other matters, concluded (page 292):

"In our view the District Court should have declined upon its findings to retain jurisdiction, and in that event the decrees for the return of the money should have been without prejudice to the right of respondents to litigate in a proper court, which modification we direct to be made."

Now certainly, as regards any balance above its charges for storage, which evidently from the facts stated on page 283 did not equal the entire value of the deposited seed, the warehouse company had possession not for itself but for whoever might be entitled to the seed, whether the pledgees of the receipts or the other creditors. It certainly had no beneficial interest of its own. Thus far, was it not in exactly the same position as the bank is in the case at bar? And therefore, if there was no constructive possession in the officer of the Bankrupt Court in the one case, neither is there in the other, and there can be no summary jurisdiction.

We respectfully submit, therefore, that where the party in possession, although itself without a beneficial interest, fully represents adverse claimants (56 ff), and where, in any event, the Court of Bankruptcy has no possession, either actual or constructive, there is no summary jurisdiction; that there was no summary jurisdiction in the case at bar; and that the Third Question should be answered in the *negative*.

V.

CONCLUSION.

In conclusion we respectfully urge:

1. That the First Question should be answered in the *affirmative*, because under the law of Virginia the bank in the case at bar had possession of the fund as an agent or arm of the State Court and was in all respects subject to its orders, and, even if this were not true, the character of the suit in the State Court was such as to confer upon it constructive possession, as against all other courts of co-ordinate and concurrent jurisdiction, upon the filing of the bill, since otherwise its jurisdiction, invoked by all parties, would have been nugatory;

2. That the Second Question should be answered in the *negative*, because the jurisdiction of the State Court in the case at bar did not depend upon, or deal with, any right or title invalidated by bankruptcy, and the general jurisdiction of the Bankruptcy Court conferred upon it no power, except in the cases (not here involved) prescribed in the Act, to meddle with property under the jurisdiction and control of a State Court, so that in the case at bar the two courts were in all respects co-ordinate;

3. That the Third Question should be answered in the *negative*, because the bank in the case at bar had possession of the property on behalf of its *cestuis que trustent*, whose claim thereto was substantial, *bona fide* and adverse, and in any event there was never any actual or constructive pos-

session on the part of the Bankruptcy Court or its agents, so that the Bankruptcy Court was powerless to dispose of the fund in summary proceedings.

Respectfully submitted,

J. JORDAN LEAKE,
A. S. BUFORD, JR.,
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Counsel for State-Planters Bank and Trust Company.

Richmond, Virginia,
February 4th, 1931.

APPENDIX.

(See page 20, *supra*) :

"In *Palmer* v. *Texas*, the suit in the state court was an action by the state to forfeit the charter of the corporation and wind up its affairs. The suit in the United States court was an action by a stockholder to liquidate the corporation. Both were substantially alike in purpose. The state court had proceeded so far as to appoint receivers of the property and had merely delayed their taking possession until the case might be examined on appeal in the court above. The state court was held to be in constructive possession all the time, and was given priority of jurisdiction over the property as against the receivers of a federal court who had taken actual possession under a subsequent bill.

"In *Farmers' Loan & Trust Co.* v. *Lake Street Railroad Company*, the suit in the federal court was an action to foreclose a mortgage, and the one in the state court sought to enjoin the foreclosure. In that case the controversies were held to be substantially the same, and the filing of the bill in foreclosure in the federal court was held to be a constructive possession of the property.

"In *Moran* v. *Sturges*, on the other hand, the controversy was between the jurisdiction of a state court in winding up a corporation and the distribution of its assets which included navigable vessels and the jurisdiction of the federal court which had taken actual possession of the vessels to enforce the collection of maritime liens on them. It was held that, as the state court had no capacity to take jurisdiction of the maritime liens and enforce them, there was not concurrent jurisdiction, and therefore the court which first obtained actual possession of the vessels by its receiver was entitled to retain it without interference.

"In *Empire Trust Co.* v. *Brooks* (C. C. A.) 232 F. 641, a suit was pending in the state court for the dissolution of a corporation and the distribution of its assets under a state statute, but it had made no order appointing a receiver and had not taken actual possession of the property at the time the suit was brought. A subsequent suit was brought against the corporation in the federal court to foreclose a mortgage upon the property and a receiver was appointed who took possession of the property and it was held in a carefully reasoned opinion that the federal court by receivership had acquired priority of jurisdiction with respect to the property mortgaged, on the ground that the issues and subject-matter of the two suits were not essentially the same and that there was no conflict of jurisdiction. See, also, *De La Vergne Refrigerating Machine Co.* v. *Palmetto Brewing Co.* (C. C. A.) 72 F. 579, 584, 585."

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BRIEF FOR BANKRUPTCY TRUSTEES.

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 166.

STATE-PLANTERS BANK AND TRUST COMPANY, J. JORDAN LEAKE AND A. S. BUFORD, JR., PARTNERS TRADING UNDER THE FIRM NAME AND STYLE OF LEAKE AND BUFORD, AND THE FIRST NATIONAL COMPANY,

v.

T. NELSON PARKER, ELSWORTH WILTSHIRE AND M. POPE TAYLOR, TRUSTEES IN BANKRUPTCY OF THE ESTATE OF EDWARDS-SLAUGHTER CO., INC., BANKRUPT.

On Appeal to Superintend and Revise, in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of Virginia, at Richmond, in Bankruptcy.

On a Certificate from the United States Circuit Court of Appeals for the Fourth Circuit.

Leon T. Seawell,
John W. Oast, Jr.,
Counsel for Bankruptcy Trustees.

THE RELIANCE PRESS OF NORFOLK, VA., INC.

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Supreme Court of the United States

October Term, 1930.

No. 166.

State-Planters Bank and Trust Company, J. Jordan Leake and A. S. Buford, Jr., partners trading under the firm name and style of Leake and Buford, and The First National Company,

v.

T. Nelson Parker, Elsworth Wiltshire and M. Pope Taylor, Trustees in Bankruptcy of the Estate of Edwards-Slaughter Co., Inc., Bankrupt.

On Appeal to Superintend and Revise in Matter of Law, Proceedings of the District Court of the United States for the Eastern District of Virginia, at Richmond, in Bankruptcy.

On a certificate from the United States Circuit Court of Appeals for the Fourth Circuit.

BRIEF FOR BANKRUPTCY TRUSTEES.

The facts out of which this controversy arose are set forth by the Circuit Court of Appeals as follows:

I.

FACTS CERTIFIED.

This is an appeal from orders entered in bankruptcy proceedings of the Edwards-Slaughter Company; and the principal question involved is the power of the District Court to enjoin proceedings in a state court instituted more than four months prior to bankruptcy to determine the rights of lien claimants in a fund now claimed by the trustees as representing the bankrupt. There is raised also the question of the power of the court in a summary proceeding to order that the fund be paid over to the trustees when it appears that such fund is adversely held by a third person under a substantial and *bona fide* claim of right. From orders entered by the court below in favor of the trustees in bankruptcy, this appeal was taken by the State-Planters Bank and Trust Company, and its attorneys, who were enjoined from prosecuting the proceedings in the state court, and by the First National Company, one of the parties to those proceedings.

The facts out of which these jurisdictional questions arise are as follows: The bankrupt, on July 1, 1925, executed a deed of trust on certain property to the State-Planters Bank and Trust Company, hereinafter called the bank, to secure $60,000 in bonds, the payment of which was guaranteed by the First National Company. The bankrupt also executed and delivered to the bank its promissory note in the sum of $20,000, secured by a preferred maritime mortgage on the steamship M. M. Davis, to be held under the terms of the deed of trust as security for the bonds. It also delivered insurance policies upon the steamship

in the amount of $60,000, payable to bankrupt and to the bank as trustee, in accordance with article ten of the deed of trust, which required that, so long as any of the bonds should be outstanding, bankrupt should carry fire and marine insurance on its steamers indorsed to the trustee. Later, when these policies were about to lapse for non-payment of premiums, the bank paid the premiums and renewed the policies with funds paid to it upon demand by the First National Company, the guarantor of the bonds secured.

The steamship was destroyed by fire on September 18, 1927, and there was collected on the policies insuring it the net sum of $58,256.67. A controversy arose as to whether the whole of this amount or only $20,000 thereof was applicable to the bonds secured by the deed of trust, the bank contending that it was entitled to apply the entire amount to this purpose, because of a provision of the deed of trust to the effect that all proceeds of insurance should be treated in the same manner as proceeds from a sale by foreclosure and should be applied in payment of bonds. For the purpose of determining this controversy, it instituted a suit in chancery, filing a bill of complaint in the Circuit Court for Northumberland County, Virginia, against the bankrupt and others, in which it alleged that the holders of the bonds and interest coupons secured by the deed of trust were entitled to the entire proceeds of the insurance policies, but that, as certain claims had been asserted against these proceeds by others than the bond and coupon holders, it desired to have the guidance and protection of the court, and therefore requested it to supervise the distribution of the fund. The bankrupt and the guarantor filed answers to the

bill, alleging that the entire proceeds of the insurance should be used in payment of the bonds and coupons and praying that same be so used.

This suit in the state court was instituted February 8, 1928. An order was entered on May 24, 1928, referring it to a master in chancery, and on September 29th following he filed his report therein. Prior to this, on August 8th, 1928, the Edwards-Slaughter Company had been adjudged a bankrupt, and when the master's report was filed on September 29th, a rule was issued by the Judge below against the bank and its attorneys to show cause why they should not be enjoined from further prosecuting the suit in the state court. This rule was made absolute on October 23, 1928, and on November 1st an order was entered directing the bank to pay into the bankruptcy court the fund in its hands. From these orders the bank and its attorneys appealed. Pursuant to the order the fund was paid over to the trustees, and is now in their hands.

The guarantor, not having been made a party to the rule, filed its petition setting forth the facts of the case, challenging the jurisdiction of the court to interfere with the proceedings in the state court, or by summary proceedings to require an adverse claimant of the fund in controversy to pay same into court, and praying that the injunction and order be set aside and the fund returned to the bank. The court, upon objection by the trustees in bankruptcy, declined to permit the guarantor to intervene or file its petition; and it, also, has appealed.

Being divided and in doubt, this Court respectfully certifies to the Supreme Court of the United States for its instruction and advice, the following questions of law, the determination of which is indispensable to a proper decision of the case:

II.

QUESTIONS CERTIFIED.

1. Where a trustee under a mortgage, having in its possession a fund which it claims to be subject to the mortgage, institutes a suit in a state court of chancery asking the court to declare the rights of the parties in the fund and supervise the distribution thereof, and makes parties thereto and obtains service upon all persons claiming an interest in the fund, who file answers praying action on the part of the court, does the state court acquire such jurisdiction of the *res* as gives it exclusive jurisdiction to determine the rights of the parties in the fund and order the distribution thereof?

2. Where a state court has acquired jurisdiction of the *res* in a suit instituted by a trustee to have the rights of claimants declared in a trust fund and to have such fund distributed under direction of the court, does the bankruptcy of one of the claimants of the fund occurring more than four months after the institution of the suit in the state court oust the state court of jurisdiction and vest exclusive jurisdiction in the bankruptcy court to determine the rights of the parties in the fund?

3. Where a fund claimed by a trustee in bankruptcy is held by a trustee under a mortgage executed by the bankrupt under a *bona fide* and substantial claim that it should be applied on bonds secured by the mortgage, has the court of bankruptcy the power to order its transfer to the trustee in bankruptcy in a summary proceeding?

III.

THE POSITION OF THE BANKRUPTCY TRUSTEES.

FIRST: The First Question should be answered, Yes; except as to a Bankruptcy Court whose jurisdiction is properly invoked.

SECOND: The Second Question should be answered, Yes, if the Bankruptcy Court elects to properly invoke its jurisdiction.

THIRD: The Third Question should be answered, Yes.

IV.

ARGUMENT.

A. The First Question Should Be Answered, Yes; Except As To A Bankrupcy Court Whose Jurisdiction Is Properly Invoked.

and

The Second Question Should Be Answered, Yes; If The Bankruptcy Court Elects To Properly Invoke Its Jurisdiction.

1. Why the Answers to the First Question and the Second Question Should Each Contain An Exception As to the Bankruptcy Court.

The First Question contains no reference to the effect of bankruptcy upon the State Court's jurisdiction. As we understand the law, if the First Question is confined to a conflict between courts of concurrent and co-ordinate jurisdiction the answer should, upon the authority of *Harkin* v. *Brundage*, 276 U. S. 36, and many other cases, be an unqualified "Yes", and we shall therefore not have occasion to debate about the answer of the Bank to the First Question on any ground other than whether the State Court and the Bankruptcy Court are of concurrent and co-ordinate jurisdiction.

The Second Question would seem to inquire whether an adjudication of a claimant as a bankrupt within four months of the institution of a suit in a state court, of its own force ousts the state court of jurisdiction. If that is a correct reading of the Second Question we also answer with an unqualified "No," because as we will point out later

on, the "four month" interval is not a factor in the case at bar and this court held in 1875, in *Eystes* v. *Gaff*, 91, U. S. 521, that:

> "* * * It is a mistake to suppose that the Bankrupt Law, avoids of its own force all judicial proceedings in the state or other courts the instant one of the parties is adjudged a bankrupt. There is nothing in the act which sanctions such a proposition. * * *"

Our position is that the Bankruptcy Court can only oust the State Court by properly invoking the exclusive jurisdiction of the Bankruptcy Court. Thus, as with the First Question, we shall not have occasion to debate the answer to the Second Question on any other ground than whether the State Court and the Bankruptcy Court are of concurrent and co-ordinate jurisdiction and can only answer the first two questions with an exception as to the Bankruptcy Court.

2. THE BANKRUPTCY COURT HAS EXCLUSIVE JURISDICTION OF THE ADMINISTRATION OF THE BANKRUPT'S ESTATE AGAINST ANY OTHER COURT, STATE OR FEDERAL; AND IS NOT A COURT OF CONCURRENT AND CO-ORDINATE JURISDICTION.

In the case at bar the proceeding in the State Court was not a proceeding to establish a lien or in any sense a hostile proceeding. While the bank (52ff) alleged the bond holders were entitled to the entire fund the proceeding was really a *plain insolvency proceeding* wherein the State Court was asked by the Bank to do what only the Bankruptcy Court had the exclusive jurisdiction to do upon the adjudication of the bankrupt. The Bankruptcy Court was then confronted with the question as to who should de-

termine the rights, priorities and liens in and upon the bankrupt's estate. Should it be the State Court as to the fund and the Bankruptcy Court as to the remainder; or should the Bankruptcy Court, after having started to administer the whole of the bankrupt's estate and all questions of conflicting interests therein abdicate this responsibility because of the pendency of the State Court proceeding? Should the creditors be required to proceed in two courts? Should they be subjected to the delay of a chancery cause and the bankrupt's assets subjected to the additional expense of a chancery suit in which the bankrupt had filed an answer waiving any right in about forty thousand dollars which on right depends on a point of law about which there is a substantial doubt, and thus put that amount beyond the reach of its general creditors? The Bankruptcy Court did the sensible thing and properly invoked its exclusive jurisdiction by enjoining the Bank from proceeding further in the State Court and requiring the fund to be deposited in the registry of the Bankruptcy Court (77ff). As said by this Court in *United States Fidelity & G. Co.* v *Bray*, 225 U. S. 205, 218:

> "* * * A distinct purpose of the bankruptcy act is to subject the administration of the estates of bankrupts to the control of tribunals clothed with authority and charged with the duty of proceeding to final settlement and distribution in a summary way as are the courts of bankruptcy. Creditors are entitled to have this authority exercised, and justly may complain, when, as here an important part of the administration is sought to be effected through slower and less appropriate processes of a plenary suit in equity in another court involving collateral and extraneous matters with which they have no concern, such as the controversy between the complainant and the indemnitor banks. * * *"

(a) THE EXCLUSIVENESS OF BANKRUPTCY JURISDICTION.

In the case of *In re Watts & Sachs*, 190 U. S. 1, 27 this Court said:

> "* * * And the operation of the bankruptcy laws of the United States can not be defeated by insolvent commercial corporations applying to be wound up under state statutes. The bankruptcy law is paramount and the jurisdiction of the Federal courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive. * * *"

We note the Bank's comment (Brief p. 50) upon the phrase "when properly invoked" in the above quotation. We have, we think, applied that phrase in our own formulary (A. 2) in the sense we believe this Court used it.

We answer the seven points (Bank's brief, pp. 52, 53) against the case of *In re Watts & Sachs*, supra, in their order.

1. The four months interval is of no importance because in the case at bar no lien is in question as to time of accrual, and no lien is *dependent* upon the continuance of the State Court proceeding.

2. All the jurisdiction of the Bankruptcy Court is (subject only to Section 23; Title 11:§46, U. S. C. A.) exclusive.

3. For the same reason the amendment of 1903 did not limit the decision.

4. Mr. Justice Harlan's concurring opinion does not deny the soundness of the majority view.

5. While it is true that *Pickens* v. *Roy*, and *Metcalf* v. *Barker*, *infra*, were not referred to in the opinion the fact is that this Court then had those cases there urged upon it because in Volume 47 of Law Ed., those cases were cited in the synopsis of Mr. Fairleigh's brief at page 939.

6. In the case at bar no lien was dependent upon the continuance of the State Court proceeding as in *Metcalf* v. *Barker* and *Pickens* v. *Roy*, *infra*.

7. Until this hearing perhaps this Court may not have had occasion to apply it to an injunction against State Court proceedings.

In the case of *In re Grafton Light & Power Co.*, 253 Fed. 668, 674, Judge Dayton said:

> "In *Graham* v. *Davy-Pocahontas Co.*, 228 Fed. 488, 151 C. C. A. 424, it was held that the Bankruptcy Court is not deprived of its exclusive jurisdiction, although the sole act of insolvency charged is the appointment of a receiver by a state court in a suit more than four months old; the appointment of the receiver by it having been made within four months of the institution of the bankruptcy proceeding. This case, it seems to me, is important, because of its bearing upon the constantly assumed position taken by counsel interested in maintaining the state court jurisdiction in this class of cases, that the four months period is controlling and if the state suit has been pending and a receiver has been appointed more than that length of time the Bankruptcy Court should not take over the estate and administer it, but allow the State Court to do so. In this Graham case it is held, if I interpret aright, immaterial how long the State Court suit has been pending, but in the exceptional case where one is sought to be forced into involuntary bankruptcy alone on the ground of the appointment of a receiver such appointment must have

been within four months, because the act requires some act of bankruptcy to have been committed within four months before involuntary proceedings can be maintained at all. No such condition can ever arise in a voluntary proceeding; therefore, in such cases, I am constrained to believe the 'four month period' has no relevancy whatever."

In *New River Coal Co.* v. *Ruffner*, 165 Fed. 881, 885, the Court said:

> "The Court of Bankruptcy has exclusive power to determine whether a suit pending in the State Court should be stayed or not, and the exercise of this power rests in the discretion of the judge. It is true that this discretion can be reviewed by a Circuit Court of Appeals on petition for review, but will not be interfered with by the appellate court unless it appears that it has been abused."

In *Bank of Dillon* v. *Murchison*, 213 Fed. 147, this Court said:

> "We are not greatly impressed with the argument made by counsel for the bank that comity required by the court below to refrain from taking charge of and administering the *res*, instead of leaving the same to be administered by the State Court.
>
> The bankrupt law is supreme and its practical and plenary administration is more and more demonstrating the fact that it must, to a very great extent, be exclusive. This, among other reasons, because the insolvent laws of so many of the states are in conflict with the bankrupt act as to the method and order of distribution; because distribution by state courts curtail creditors' rights as to hearings, selection of administering trustees, and other de-

tails, secured to them by the bankrupt act; and because of costs, delays, and confusion arising from a dual administration.

The bankrupt law being supreme, and the District Judge of the United States being constituted the especial judicial expounder of it, the responsibility is primarily upon him to determine, in each case, whether its administration shall be shared with another. His discretion in the premises will be rarely reviewed unless abuse of it is clearly shown. *New River Coal Land Co.* v. *Ruffner Bros.*, 165 Fed. 881, 91 C. C. A. 559; *Va. Iron, Coal & Coke Co.* v. *Olcott*, 197 Fed. 730, 117 C. C. A. 124."

In *Bailey* v. *Blackmon*, 14 Fed. (2nd) 16 the Court (4th Circuit) said:

"In the early stages of the bankruptcy law, prior to the amendments of 1903 and 1910, just what the status of the two courts was, and whether they were not entirely controlled by rules of comity, were subjects of much consideration. *Bardes* v. *Bank*, 178 U. S. 524; *Metcalf* v. *Barker*, 187 U. S. 165; *Pickens* v. *Roy*, 187 U. S. 177. Since the rendition of these decisions, however, and the amendments to the Bankruptcy Act, especially that of 1903, the position of the Bankruptcy Court seems to have been definitely settled, in this, that while the rules with respect to comity between the courts shall be respected where the same can be done without violence to the rights of the bankrupt estate and its creditors, nevertheless the jurisdiction of the bankruptcy court in the administration of the affairs of insolvents, under the Constitution and laws of the United States, is exclusive of all other courts. In a decision of the Supreme Court of the United States (*In re Watts, etc.*, 190 U. S. 1), rendered almost immediately following the amended Bankruptcy Act of February 5, 1903, an important

and leading case, the question of the exclusive jurisdiction of the Bankruptcy Court and the control of the estates of bankrupts was recognized as above stated, and, at page 27, Chief Justice Fuller, speaking for the court, said:

"The bankruptcy law is paramount, and the jurisdiction of the federal courts in bankruptcy, when properly invoked in the administration of the affairs of insolvent persons and corporations, is essentially exclusive. Necessarily when like proceedings in the state courts are determined by the commencement of proceedings in bankruptcy, care has to be taken to avoid collision in respect of property in possession of the state courts. Such cases are not cases of adverse possession, or of possession in enforcement of preexisting liens, or in aid of the bankruptcy proceedings. The general rule as between courts of concurrent jurisdiction is that property already in possession of the receiver of one court cannot rightfully be taken from him without the court's consent, by the receiver of another court appointed in a subsequent suit, but that rule can have only a qualified application where winding up proceedings are superseded by those in bankruptcy as to which the jurisdiction is not concurrent."

With the permission of Mr. Arthur F. Kingdon, of the Bluefield, W. Va. bar we quote in the appendix, from an elaborate opinion of the late Mr. Justice Sanford, written in the matter of *Tennessee Marble Co., Knoxville,* case No. 857, prior to his elevation to this court. The opinion is unreported but Mr. Kingdon has a certified copy in his possession which is available if desired.

(b) BANKRUPTCY COURTS ARE NOT OF CONCURRENT JURISDICTION WITH ANY OTHER COURT.

Section 2 of the Act (Title 11:§11 U. S. C. A.) is as follows:

> "The courts of bankruptcy * * * are hereby invested * * * with such jurisdiction * * * as will enable them * * * to * * * (7) cause the estates of bankrupts to be collected, reduced to money and distributed, and determine controversies in relation thereto, except as herein otherwise provided; * * * (15) make such orders, issue such process, and enter such judgments in addition to those specifically provided for as may be necessary for the provisions of this title; * * * Nothing in this section contained shall be construed to deprive a court of bankruptcy of any power it would possess were certain specific powers not herein enumerated."

The Bank (Brief 40) makes the above quotation and says as there is nothing there *expressly* applicable to the case at bar they must look to the adjudicated cases. We submit the Act is quite clear and that this Court through Chief Justice Fuller in his opinion in *In re Watts & Sachs*, 190 U. S. 1, 27, has distinctly said that bankruptcy jurisdiction is not concurrent. The cases cited by the Bank in this connection are not in point.

Metcalf v. *Barker*, 187 U. S. 165.
Pickens v. *Roy*, 187 U. S. 177.

The true application in *Pickens* v. *Roy*, *and Metcalf* v. *Barker*, *supra*, and the rule of law for which they stand has been specifically declared by the late Judge Woods, speaking for the Circuit Court of Appeals (4th Circuit) in his opinion in the case of *Griffin* v. *Lenhart*, 256 Fed.

671. There, after considering those cases, he states the true rule as follows:

> "But this rule does not apply to protective proceedings instituted in a state court. The principle of the bankruptcy statute paramount to all others is that all creditors shall have the right to a speedy winding up of the bankrupt business and distribution of the assets. No creditors can be deprived of this right by a proceeding instituted at any time in a state court by an insolvent or any of his creditors, for the purpose of continuing his business or protecting the assets against creditors, or in any way delaying creditors. This is none the less true, although one of the objects of the creditors' proceedings in the state court be to acquire a lien, and the actual result be the creation of a lien more than four months before the filing of the petition in bankruptcy."

The inapplicability of *Pickens* v. *Roy* and *Metcalf* v. *Barker*, or to state it in another way, the reason why this case is not within the rule as stated by those cases is that the State Court proceeding in the case at bar was not in any sense a hostile proceeding; the lien of the deed of trust was not in question; no adverse possession is involved, and the proceedings were plainly limited to a friendly request by a presumably impartial trustee for instructions as to the distribution of the assets of an insolvent bankrupt.

In re Farrell, 201 Fed. 338 (Bank's brief, 47): In that case the fund was held by a stranger beyond the territorial limits of the Bankruptcy Court and it was held that the Act limits the several courts of bankruptcy to "within their respective territorial limits."

In re English et al, 127 Fed. 940 (Bank's brief, 48, 49): In that case the State Court had entered judgment

a year before the adjudication in bankruptcy and decided what part of the common property belonged to the bankrupt. The Court merely in line with *Eyster* v. *Gaff*, 91 U. S. 521, that the adjudication in bankruptcy did of its own force not affect such State Court judgment.

As Chief Justice Marshall said in *Postmaster Gen.* v. *Early*, 12 Wheat (U. S.) 136, 146; where he was construing a statute, "* * * for one body to do a thing concurrently with another is to act in conjunction with that other; it is equivalent to saying, the one may act together with the other * * *." Congress has set up only one bankruptcy jurisdiction. Certainly an exclusive and paramount jurisdiction may not in its field be infringed upon by, or be concurrent with another court. This court in *United States F. & G. Co.* v. *Bray*, 225 U. S. 205, denied the right of a Federal Court to do any part of the work in the administration of a bankrupt's estate, even with the consent of the Bankruptcy Court.

B. The Third Question Should Be Answered, Yes.

The question is are the facts such as to bring the possession of the fund by the Bank within Section 23 of the Act (Title 11:§46 U. S. C. A.) In other words is the Bank an Adverse Claimant? We assert:

(1) The Bank Is Not An Adverse Claimant.

It is only a trustee under a deed of trust.

(a) The Bank Has No Beneficial Interest In the Fund.

There is nothing in the "Facts Certified" supra, to suggest otherwise.

(b) THERE IS ONLY A QUESTION OF LAW INVOLVED.

The "Facts Certified," supra, (51ff) show clearly that the State Court proceeding involved nothing but a question of law. In that proceeding there was a complete absence of any question of fact. There was nothing in the State Court proceeding but the matter of interpretation of the deed of trust. In such a situation the power of the Bankruptcy Court to enter a summary order is clear. In the case of *In re Michaelis Lindeman*, 196 Fed. 718, 719, the late Judge Hough said:

> "It may also be admitted that there is no power in the court by summary order to divest third party of any title (even a fraudulent one) asserted by him against the bankrupt or his trustee. But this does not prevent the entry of a summary order where the only title set up rests, not upon any matter of fact, but upon a statement of law."

In the case of *In re R. W. Skirt Co.*, 222 Fed. 256, 257, the late Circuit Judge Coxe said:

> "We have no doubt that a plenary suit will lie in such circumstances: The question is, Was such a suit absolutely necessary? The Bankruptcy Act is in itself a summary proceeding. Its principal aim and object is to divide the bankrupt's property among his honest creditors as speedily as possible. The purpose of the act will be largely defeated if each time a question of law arises over the title to property an action at law or a suit in equity must be commenced. In all these cases time will be lost and the assets depleted if the complicated machinery of a suit must be set in motion. After all is said and done, the question at issue must be determined by the court as a matter of law. In

the present case there are no facts in dispute. * * *"
Citing: *Lazarus* v. *Prentice*, 234 U. S. 263, 266.
Everett v. *Judson*, 228 U. S. 474, 478.
Bryan v. *Bernheimer*, 181 U. S. 188.
Mueller v. *Nugent*, 184 U. S. 17.

The cases cited by the Bank (Brief, 58, 59, 60, 61) are not in point.

In re Baudouine, 101 Fed. 574, 578: There the laws of New York vested the whole of the estate in *law and equity was vested in the testamentary trustees.*

In re Farrell, 201 Fed. 338: There the contractor was the bankrupt,—not the owner in whom title to the money lay subject to the ascertainment of liens which involved questions of facts. The fund there was also beyond the territorial jurisdiction of the Bankruptcy Court.

First National Bank v. *Chicago Title & Trust Co.*: There the warehouse receipts represented the seed and left no title in the bankrupt to seed in the warehouse possession.

V.

CONCLUSION.

1. The First Question should be answered, Yes; except as to a Bankruptcy Court whose jurisdiction is properly invoked.

2. The Second Question should be answered, Yes; if the Bankruptcy Court elects to properly invoke its jurisdiction.

3. The Third Question should be answered, Yes.

Respectfully submitted,

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JOHN W. OAST, JR.,
Counsel for Bankruptcy Trustees.

APPENDIX.

Quotations from the unreported opinion of the late Justice Sanford (then judge), in the matter of Tennesse *Marble Co., Knoxville, Case No. 857:*

> "It is true that in some of the decisions in which insolvent proceedings in the State courts have been held to be terminated by an adjudication in bankruptcy, the decision has been based upon the fact that the receiver has been appointed in such insolvency proceedings within four months preceding the filing of the bankruptcy petition; and in others upon the ground that the appointment of a receiver in such insolvency proceedings was a specific ground upon which the subsequent adjudication in bankruptcy was made (1 Remington on Bankruptcy, ss. 1602, 1603, P. 996; Loveland on Bankruptcy (3rd ed.) ss. 23, p. 117; Collier on Bankruptcy (7th ed.) ss. 23b, p. 418; and cases cited). Most of these decisions were rendered, however, before that in the Watts case, and any implied limitation of the general rule to such specific cases is, I think, inconsistent with the broad principles of the paramount jurisdiction of the bankruptcy court stated in the opinion in that case. * * * I rest my opinion in this case upon the doctrine stated by the Supreme Court in the Watts case, that the bankruptcy law is paramount, and the jurisdiction of the Federal Courts in bankruptcy, when properly invoked, in the administration of the affairs of insolvent persons and corporations, is essentially exclusive, and the broad principle that such paramount and exclusive jurisdiction of the bankruptcy court necessarily terminates the jurisdiction of any other court in prior proceedings of like character for winding up the estate of the bankrupt, which are necessarily inconsistent with the administration of the estate by the bank-

ruptcy court and incompatible with the discharge of the duties of the bankruptcy court under the Bankruptcy Act."

Justice Sanford then quotes from Re. Hecox (C. C. A.) 164 Fed. 823, 825, as follows:

> "The scheme as well as the policy of the bankrupt act is that the collecting, marshalling, administration, and distribution of the bankrupt's estate shall reside exclusively in the court of bankruptcy."

Justice Sanford next quotes from Re. Smith, 92 Fed. 135, as follows:

> "The bankruptcy act contemplates no divided jurisdiction. It would cease to possess any vital force or efficiency if the State court, proceeding under our state insolvent laws, may hold possession of the bankrupt's estate, collect in the debts, allow claims, and make final distribution among those entitled to participate therein, leaving to the court nothing but the adjudication of bankruptcy and the discharge of the bankrupt. Such a construction is inadmissible because it would render inoperative numerous express provisions of the bankruptcy act. * * * The Bankruptcy Act is the supreme law of the land, enacted in pursuance of an express grant of constitutional authority; and, in so far as any state law is in conflict with it, such law is suspended and remains inoperative until the federal enactment is repealed. All matters embraced in the bankruptcy act must be controlled and governed by its provisions. Among these are the right and duty of the bankruptcy court to have insolvent estates settled in and by it, under and in accordance with the provisions of the bankruptcy act; * * * to have liens and preferences governed by it. * * * In my opinion, the operation of the State law is

suspended, and the State courts are without any jurisdiction or authority to administer the estates of bankrupts or insolvents * * *. The jurisdiction of the bankruptcy law is supreme, it is exclusive and the acts of the State courts are unauthorized and void, because jurisdiction over the person and estate of the bankrupt is drawn to, and vested exclusively in, this court by the adjudication of bankruptcy."

Justice Sanford also quoted from Re. Whipple, 6 Biss. 516, Fed. Case No. 17, 512, in which it was held:

"Proceedings in bankruptcy superseded a creditors' bill in a State court, and the receiver appointed by the State court could be compelled to deliver the property to the assignee in bankruptcy, subject to all rights or priorities which the creditors whom he represented had obtained by their diligence."

In that case the Court said:

"It seems utterly impossible to carry on the two administrations together; the estate should be administrated in one court, and I think the bankrupt court the proper one. * * * And I think that the better authority and the more reasonable doctrine is that the proceedings in bankruptcy supersede all other proceedings for the administration of the assets of the debtor, subject only to priorities which are obtained by any creditor by the use of diligence, which are to be respected and which should be paid in the order of priority, according to whatever rights have been obtained."

Justice Sanford cites other Federal decisions; also decisions of State Supreme Courts as follows:

> "In the case of Mauran v. Carpet Lining Co., 6 Am. Bankr. Rep. 737, 23 R. I. 324, 50 Atl. 331, the Supreme Court of Rhode Island said:
>
> "The plenary and paramount power of Congress to establish uniform laws on the subject of bankruptcies throughout the United States," says Hall, J., in Re Deposit Savings Inst., Fed. Cas., No. 12,221, p. 141, is given in express terms by the Constitution of the United States. It is therefore very clear that when Congress has exercised the power thus conferred their action must necessarily control or limit the exercise of the power of the States over the same subject matter; and that whenever any State legislation, or any action of the State courts, comes *practically* into actual conflict with the proper execution of the laws of Congress, constitutionally passed under such grant of power, State legislation and the jurisdiction and action of the State courts must yield to the paramount authority of the national government."
>
> "The object and intent of the national bankruptcy law is to place the administration of the affairs of insolvent persons and corporations exclusively under the jurisdiction of the Federal Courts sitting as courts of bankruptcy * * *."

He then quoted from the case of *Herron Co.* v. *Superior Ct.*, 8 Am. Bankr. Rep. 493, 136 Cal. 279, Pac. 814, 89 Am. St. Rep. 124, in which the Supreme Court of California said:

> "The provision in the Constitution of the United States conferring upon Congress the power to establish uniform laws on the subject of bankruptcies throughout the United States, of necessity

makes any act of Congress passed upon the subject the supreme law of the land, and it was at a very early day determined that the effect of such action of Congress is to suspend and supersede the operation of any State law of insolvency whenever there is a conflict between the two. There can be no concurrent jurisdiction in the two sovereignties over the same subject, and, as the people of the several States have yielded to the United States the power to enact laws upon this subject, it follows that when the United States has enacted a law the power of the State to enforce its own law upon that subject, whether it be similar or different, must yield to what is the supreme law of the land."

From Loveland on Bankruptcy (3rd ed.) Sec. 23, P. 116, Justice Sanford cites the following:

"But where the possession of the state court would have the effect of defeating the operation of the bankruptcy law, the courts of bankruptcy may seize such property for the purpose of administering it in accordance with that law. The reason for this is that the bankruptcy law places the administration of the affairs of insolvents exclusively under the jurisdiction of the bankruptcy courts. In this respect the state courts have not concurrent jurisdiction with the courts of bankruptcy, and the general rule of comity has no application. The bankruptcy law is paramount and should not be defeated by proceedings in a state court."

And from 1 Remington on Bankruptcy, Sec. 1625, P. 988, Justice Sanford cites the following:

"The third exception to the rule that the state court retains jurisdiction if first in possession of the res, is where the property at the time of the bankruptcy is in the custody of a State court under

State insolvency or State bankruptcy proceedings, or proceedings amounting to such, in which event proceedings are suspended by the Federal bankruptcy proceedings."

In closing his opinion, Justice Sanford said:

"I have reached the conclusion stated in this opinion after most careful consideration, with a deep sense of the importance of the question involved."

SUPREME COURT OF THE UNITED STATES.

No. 166.—October Term, 1930.

State-Planters Bank and Trust Co., et al., Appellants, *vs.* T. Nelson Parker, et al., Trustees in Bankruptcy of the Estate of Edwards-Slaughter Co., Inc. | On Certificate from the United States Circuit Court of Appeals for the Fourth Circuit.

[April 20, 1931.]

Mr. Justice Roberts delivered the opinion of the Court.

The facts stated in the certificate follow.

July 1, 1925, Edwards-Slaughter Co., Inc., executed a deed of trust to State-Planters Bank and Trust Company to secure $60,000 in bonds, the payment of which was guaranteed by First National Company. It also executed and delivered to the bank its promissory note in the sum of $20,000, secured by a preferred maritime mortgage on one of its vessels, to be held under the terms of the trust instrument as security for the bonds. In accordance with article ten of the deed, which required that, so long as any of the bonds should be outstanding, the bankrupt should carry fire and marine insurance on its steamers, endorsed to the trustee, policies upon the vessel in the amount of $60,000, payable to the bankrupt and to the bank as trustee, were duly delivered to the latter. Subsequently, when these policies were about to lapse for non-payment of premiums, the bank paid the same and renewed the policies with funds furnished to it upon demand by the guarantor.

The steamship was destroyed by fire on September 18, 1927, and the net sum of $58,256.67 was collected on the policies. A controversy arose as to whether the whole fund or only $20,000 thereof was applicable to the bonds secured by the deed of trust, the bank contending that it was entitled to apply the entire amount to this purpose, because of a provision of the deed to the effect that all

proceeds of insurance should be treated in the same manner as those from a sale by foreclosure and should be applied in payment of bonds. For the purpose of determining this dispute the bank filed its bill in the state court, against the bankrupt and others, in which it alleged that the holders of the bonds and coupons were entitled to the entire proceeds of the policies, but that, as certain claims had been asserted thereagainst by others than the bond and coupon holders, it desired to have the guidance and protection of the court, and therefore requested it to supervise the distribution of the fund. The bankrupt and the guarantor filed answers alleging that the whole of the insurance moneys should be applied to the payment of the bonds and coupons, and praying that same be so used.

The suit was instituted February 8, 1928, and on May 24 was referred to a master in chancery, who filed his report on September 29. Prior thereto, on August 8, Edwards-Slaughter Co., Inc. had been adjudged a bankrupt. Upon the filing of the master's report the district judge issued a rule against the bank and its attorneys, Leake and Buford, to show cause why they should not be enjoined from further prosecuting the suit in the state court. This rule was made absolute, and an order was entered directing the bank to pay the fund in its hands into the bankruptcy court. From this order the bank and its attorneys appealed. Pursuant to the order the fund was paid over to the trustees and is now held by them.

First National Company, not having been made a party to the rule, filed its petition challenging the jurisdiction of the court to interfere with the state court proceedings, or summarily to require an adverse claimant of the fund in controversy to pay the same into court, and praying that the injunction and order be set aside and the money returned to the bank. Upon objection by the trustees in bankruptcy the court declined to permit the guarantor to intervene or file its petition, and it also has appealed.

Three questions are certified. The first is:

1. Where a trustee under a mortgage, having in its possession a fund which it claims to be subject to the mortgage, institutes a suit in a state court of chancery asking the court to declare the rights of the parties in the fund and supervise the distribution thereof, and makes parties thereto and obtains service upon all persons claiming an interest in the fund, who file answers praying

action on the part of the court, does the state court acquire such jurisdiction of the *res* as gives it exclusive jurisdiction to determine the rights of the parties in the fund and order the distribution thereof?

This need not be answered. It is unnecessarily general, and has no reference to any conflict between the jurisdiction of a court of bankruptcy and a state court. See *White* v. *Johnson*, 282 U. S. 367, 371, and cases cited.

The second and third questions may be considered together. They are:

2. Where a state court has acquired jurisdiction of the *res* in a suit instituted by a trustee to have the rights of claimants declared in a trust fund and to have such fund distributed under direction of the court, does the bankruptcy of one of the claimants of the fund occurring more than four months after the institution of the suit in the state court oust the state court of jurisdiction and vest exclusive jurisdiction in the bankruptcy court to determine the rights of the parties in the fund?

3. Where a fund claimed by a trustee in bankruptcy is held by a trustee under a mortgage executed by the bankrupt under a *bona fide* and substantial claim that it should be applied on bonds secured by the mortgage, has the court of bankruptcy the power to order its transfer to the trustee in bankruptcy in a summary proceeding?

These constitute but one question. The facts stated do not involve the right of a trustee in bankruptcy to institute a plenary suit against an adverse claimant, or to be substituted for the bankrupt in a pending proceeding. The only question is as to the power to proceed summarily in disregard of an existing action in a state court having jurisdiction.

We do not answer these questions because the certificate does not contain a sufficient statement of the facts upon which the propositions of law arise (*Cincinnati R. R.* v. *McKeen*, 149 U. S. 259; *United States* v. *City Bank*, 19 How. 385; *Cross* v. *Evans*, 167 U. S. 60) and suggests the existence of facts which might require a different answer from that which would be given were they absent. (See *White* v. *Johnson, supra*).

Without expressing an opinion upon their legal effect, we note the following matters:

The other claims which were made against the fund in the hands of the mortgage trustee are not defined; if they were claims of liens, the nature, the dates of creation, and the possible priorities of such liens are not stated. How the bankruptcy of the debtor might affect them cannot be determined. It does not appear whether the owners of these claims were made parties to the proceeding from which the appeal was taken, or whether they had notice of it.

We are told that the bankrupt answered in the state court action and prayed that the fund be applied in payment of bonds and coupons, but the date when this occurred is not given.

It is not clear whether the only question before the state court was one of law, namely, the construction of a clause of the deed of trust, or whether there were other questions of law or fact involved. It is disclosed that the guarantor of the bonds, although a defendant in the state court, was not made a party in the bankruptcy proceeding, was refused a hearing therein, and is one of the appellants.

Inasmuch as the summary jurisdiction of the district court is challenged, any of these features of the case may have an important bearing upon a correct decision. To answer the questions as framed would, in view of what is omitted from them, though brought to our notice by the statement of facts, lead rather to misunderstanding and confusion than to the clarification of applicable rules of law.

The certificate will be dismissed.

So ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.